No.

IN THE
Supreme Court of the United States

WINTERVILLE POLICE DEPARTMENT, *et al.*

Petitioners,

v.

DIJON SHARPE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

DAN M. HARTZOG JR.
Counsel of Record
KATHERINE BARBER-JONES
RACHEL G. POSEY
HARTZOG LAW GROUP LLP
2626 Glenwood Avenue
Suite 305
Raleigh, North Carolina 27608
Telephone: (919) 670-0338
dhartzogjr@hartzoglawgroup.com

Counsel for Petitioners

QUESTIONS PRESENTED

Should the constitutionality of a law enforcement officer's restriction of livestreaming by an occupant of a seized vehicle during a lawfully initiated traffic stop be analyzed under a Fourth Amendment framework as opposed to a First Amendment framework?

If the First Amendment analysis controls, is a policy which prohibits livestreaming by an occupant of a lawfully seized vehicle a reasonable time, place, and manner restriction?

PARTIES TO THE PROCEEDING

The petitioners, defendants-appellees below, are the Winterville Police Department, William Blake Ellis, in his official capacity, and Myers Parker Helms, IV, in his individual and official capacities.

The respondent, plaintiff-appellant below, is Dijon Sharpe.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Dijon Sharpe v. Winterville Town of Winterville Police Department, Officer William Blake Ellis, in his official capacity only, and Officer Myers Parker Helms IV, both individually and in his official capacity, United States Court of Appeals for the Fourth Circuit, Case No. 21-1827. Judgment entered February 7, 2023.

Dijon Sharpe v. Town of Winterville Police Department, Officer William Blake Ellis, in his official capacity only, and Officer Myers Parker Helms IV, both individually and in his official capacity, United States District Court for the Eastern District of North Carolina, Eastern Division, Case No. 4:19-cv-157-D. Judgments entered August 20, 2020, and July 9, 2021.

TABLE OF CONTENTS

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The district court's August 20, 2020, order granting defendants' partial motion to dismiss, and dismissing the claim against the Winterville Police Department, is reported as *Sharpe v. Winterville Police Dep't*, 480 F. Supp. 3d 689 (2020) and is reproduced in the appendix at pages 46a-68a. The district court's July 9, 2021, order granting defendants' motion for judgment on the pleadings, and dismissing the remaining official capacity claims, is reported as *Sharpe v. Ellis*, No. 4:19-CV-157-D, 2021 U.S. Dist. LEXIS 128101 (E.D.N.C. July 9, 2021) and is reproduced in the appendix at pages 27a-45a. The Fourth Circuit's February 7, 2023, opinion vacating in part and affirming in part is reported as *Sharpe v. Winterville Police Dep't*, 59 F.4th 674 (4th Cir. 2023) and is reproduced in the appendix at pages 1a-26a The Fourth Circuit's April 21, 2023, order denying petitions for rehearing en banc is reported as *Sharpe v. Winterville Police Dep't*, No. 21-1827, 2023 U.S. App. LEXIS 9676 (4th Cir. 2023) and is reproduced in the appendix at pages 69a-70a.

JURISDICTION

This Court has jurisdiction to review the Fourth Circuit's February 27, 2023 opinion on writ of certiorari under 28 U.S.C. § 1254(1). Petitioner moved for rehearing en banc, which was denied by order on April 21, 2023. Pet. App. 70a. Petitioner timely applied for an extension of time to file a petition for writ of certiorari, which application was granted by The Chief Justice on July 14, 2023, extending the time for petitioner to file the petition for writ of certiorari to and including September 18, 2023. The petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment, U.S. Const. amend. I, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

> but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Chapter 42, Section 1983 of the United States Code, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Factual Background

On October 9, 2018, Dijon Sharpe was a passenger in a vehicle that was pulled over by Officer Ellis and Officer Helms of the Town of Winterville Police Department. Pet. App. 19a. While waiting for the officers to approach, Sharpe began livestreaming—broadcasting in real time—via Facebook Live to his Facebook account. *Id.*

After approaching the vehicle to explain the reason for the traffic stop, the officers returned to the patrol vehicle to run the driver's license and issue a citation. Pet. App. 29a. Upon returning to the vehicle, Officer Helms saw and confirmed that Plaintiff was live broadcasting over Facebook Live. *Id.*

Officer Helms directed Sharpe to cease livestreaming, explaining that it was an officer safety issue. *Id.* When Sharpe refused to cease broadcasting, Officer Helms reached into the vehicle toward Plaintiff's phone. *Id.* Plaintiff refused to give up his phone and leaned into the vehicle, at which point Officer Helms grabbed and quickly released Plaintiff's seatbelt. Pet. App. 48a.

Officer Ellis, who was at the driver's side, was trying to explain Staton's three citations to him and clarify the policy regarding livestreaming to both Staton and Sharpe. Pet. App. 20a. Officer Ellis explained during the encounter that their concerns regarding livestreaming were based upon the fact that anyone watching would know where the traffic stop

was being conducted. *Id.* He stated that recording was not a problem, but livestreaming was not allowed, and that Plaintiff would be arrested if he tried to livestream in the future. *Id.*

B. Proceedings in District Court

Sharpe filed suit in the United States District Court for the Eastern District of North Carolina, asserting the following claims: 1) Declaratory Judgment for violation of 42 U.S.C. § 1983 against the officers in their official capacities and the Winterville Police Department; and 2) Violation of 42 U.S.C. § 1983 against Officer Helms for the "physical attack" against Sharpe in trying to seize his cell phone. Pet. App. 30a. As part of his § 1983 claims against the Town of Winterville, Sharpe alleged that the Town had "an unconstitutional policy, custom, or practice of preventing citizens from recording and livestreaming their interactions with police officers in the public performance of their duties." *Id.* Sharpe sought declarations that (a) he "has a First Amendment-protected right to record police during the public performance of their duties," and (b) his right to record police also includes the right to "broadcast such recording in real-time," regardless of whether any other individuals view such a broadcast. Pet. App. 6a, 31a. Sharpe acknowledged that he did not bring a claim for violation of his Fourth Amendment rights against Defendants and instead intended only to assert a claim under the First Amendment. Pet. App. 49a.

On August 20, 2020, the district court, on Defendants' motion to dismiss pursuant to Rule 12(b)(6), dismissed Plaintiff's individual capacity-claims on the basis of qualified immunity. Pet. App. 53a-63a. On July 9, 2021, the district court, on Defendants' motion for judgment on the pleadings pursuant to Rule 12(c), dismissed the remaining official-capacity claims on the basis that: (1) Plaintiff failed to allege a policy, custom, or practice of the Town of Winterville sufficient to establish liability under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978); and (2) the policy alleged by Plaintiff, if it existed, would not be unconstitutional. Pet. App. 33a-43a.

C. Fourth Circuit Proceedings

Plaintiff appealed from the District Court's orders on July 27, 2021. Following briefing and argument, the majority of the Fourth Circuit panel affirmed the dismissal of the individual capacity claim on the grounds of qualified immunity. Pet. App. 13a-16a. The majority opinion vacated the dismissal of the *Monell* claims against the Town of Winterville and Officers Helms and Ellis in their official capacities and remanded for further proceedings. Pet. App. 17a.

The majority opinion held that "Sharpe plausibly alleges that the Town of Winterville has a policy preventing someone in a stopped vehicle from livestreaming their traffic stop" and that if such a policy does exist, it reaches protected speech. Pet. App. 4a. The majority further held that Sharpe plausibly alleges that such a policy constitutes a First

Amendment violation. Pet. App. 5a. The majority reasoned that "[c]reating and disseminating information is protected speech under the First Amendment" and that livestreaming falls under that category of speech. Pet. App. 8a. The majority held that Defendants did not, at this stage, sufficiently demonstrate that the Town's policy furthers or is tailored to the proffered interest in officer safety. Pet. App.10a-11a.

In his concurrence, Judge Niemeyer agreed that remand was necessary to "determine whether the Town of Winterville had a policy prohibiting livestreaming by persons detained and, if it did, whether the policy is unconstitutional." *Id.* However, he submitted that the issues in this case should be framed in the context of the Fourth Amendment, and that the important question is "whether, during a lawful traffic stop, law enforcement officers may lawfully prohibit the person detained from conducting electronic communications with others." *Id.* The concurrence explained that, even if the application of the two tests may lead to similar outcomes, it is the Fourth Amendment reasonableness test that should be applied, rather than "a traditional, free-standing First Amendment analysis" because the restrictions at issue "were imposed as a part of a lawful Fourth Amendment seizure." Pet. App. 16a-17a.

REASONS FOR GRANTING THE WRIT

Recording of law enforcement encounters has become prevalent in our society. While some Courts of

Appeals have recognized the right of bystanders to record police activities in public, this is the first case in which a Court of Appeals has addressed the right to livestream law enforcement encounters. Moreover, this is the first case in which a Court of Appeals has been faced with the right of an occupant of a seized vehicle to record or livestream an encounter while they are a subject of a traffic stop.

The decision of the Fourth Circuit in this case requires this Court to clarify that the Fourth Amendment is the proper standard for analyzing a law enforcement officer's alleged restriction of rights, including recording or livestreaming, of an occupant in a lawfully seized vehicle, and to prevent confusion among lower courts regarding the proper analysis to be applied in the context of a traffic stop.

In its decision, the Fourth Circuit bypassed the traditional Fourth Amendment reasonableness analysis regarding the officers' restriction of a passenger's livestreaming from within a seized vehicle at a traffic stop, instead holding that the Town's alleged policy of restricting livestreaming during a lawful traffic stop must be analyzed using the time, place, and manner analysis under the First Amendment.

If left undisturbed, the Fourth Circuit's opinion in this case will have far-reaching consequences for municipalities and police departments across the nation. By clarifying that the Fourth Amendment analysis controls when the rights of an occupant of a lawfully seized vehicle are temporarily restricted for

the duration of a traffic stop, the Court can ensure that law enforcement in this county are able to continue to conduct vital public safety operations, such as traffic stops, with consistent, uniformly applied constitutional standards.

This matter is ripe for review by this Court, despite being an appeal from a district court determination of a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The record needs no further development for a decision to be made on the legal issues presented at this stage. The Fourth Circuit's opinion has an immediate impact on law enforcement agencies, whether they have a policy prohibiting livestreaming or not, as it undercuts officers' ability to impose reasonable restrictions on seized individuals during a traffic stop for the purposes of protecting their own safety.

A. The Fourth Circuit's Decision Plainly Contravenes Precedent Established by This Court and the Fourth Circuit.

In its opinion, the Fourth Circuit majority focused on whether Plaintiff-Appellant plausibly alleges that a presumptive policy that prevents someone in a seized vehicle from livestreaming their traffic stop violates the First Amendment. Pet. App. 5a-6a. However, in order to reach the question of whether a municipality has an unconstitutional policy, a court must necessarily find that an individual's rights have been violated in the first place. A threshold question for resolving any claim of municipal liability pursuant to *Monell* is whether a constitutional violation

occurred. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)*; City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Here, the Fourth Circuit erred by sidestepping entirely the lawfulness of the officer's command on the scene to stop livestreaming during the traffic stop, and the necessary Fourth Amendment analysis that is required in such circumstances. The Fourth Amendment "becomes relevant" when a citizen is searched or seized. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). It is long-standing Supreme Court precedent that, during a lawfully initiated stop, law enforcement officers are "authorized to take steps as [are] reasonable to protect their personal safety and maintain the status quo during the course of the stop." *United States v. Hensley*, 469 U.S. 221, 235 (1985).

The "reasonable steps" analysis that the Fourth Circuit should have focused on is whether the minor intrusion that resulted from the request for Sharpe to stop livestreaming is outweighed by the public interest in officer safety. *See Pennsylvania v. Mimms*, 434 U.S. 106, 109-10 (1977). Only if such an intrusion was itself a violation of Sharpe's constitutional rights would the question of liability for the Town of Winterville as the officer's employer arise. By putting the *Monell* analysis of whether the Town had a policy of restricting livestreaming, and whether that policy could pass muster under a First Amendment analysis, ahead of the question of whether the officer had violated Sharpe's rights in the first place under the traditional Fourth Amendment analysis, the Fourth Circuit erred.

Law enforcement should not be required to "take unnecessary risks in the performance of their duties." *Mimms*, 434 U.S. at 110. In *Mimms*, this Court held that where there was a lawfully initiated traffic stop on a vehicle with expired tags, the intrusion presented by requiring the driver of the vehicle to step out of the car for the duration of the stop was minimal in light of the risks to officer safety presented by the driver staying seated in a vehicle. *Id*. The Court noted "that a significant percentage of murders of police officers occurs when the officers are making traffic stops." *Id.* (citing *United States v. Robinson*, 414 U.S. 218, 234 (1973)). In *Maryland v. Wilson*, this Court held that law enforcement officers making a lawful traffic stop could require passengers as well as drivers to step out of the vehicle as a matter of course, expanding on its officer safety-based ruling in *Mimms*. 519 U.S. 408 (1997). This Court, in *Wilson*, recognized that "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." *Id.* at 414.

The same analysis that this Court applied in *Mimms* and *Wilson* controls in this case. Once Sharpe was lawfully seized, restrictions on his behavior and actions fell under the umbrella of the Fourth Amendment and should have been reviewed by the Fourth Circuit as such.

As the Fourth Circuit's opinion in this case is contrary to well established and long-standing principles of Fourth Amendment analysis, this Court should grant this Petition and reverse.

B. Review is Necessary to Clarify that the Fourth Amendment Analysis Applies in the Context of a Temporary Restriction of Rights During the Course of a Traffic Stop.

While activity undertaken by law enforcement during a lawfully initiated traffic stop may implicate other provisions of the federal constitution, such as the First Amendment, it is the Fourth Amendment reasonableness analysis that this Court has historically applied to determine the constitutionality of such activity. *See, e.g., Navarette v. California*, 572 U.S. 393 (2014); *Arizona v. Johnson*, 555 U.S. 323 (2009); *Mimms*, 434 U.S. 106.

By elevating a First Amendment analysis over the Fourth Amendment reasonableness standard, the Fourth Circuit contravened this principle, and set the course for a troubling ripple effect. For example, a law enforcement officer may seize a weapon during a traffic stop "where it is vulnerable to possible theft and criminal use" even where it is not obviously contraband. *See United States v. Isham*, 501 F.2d 989, 990 (6th Cir. 1974) (citing *Cady v. Dombrowski*, 413 U.S. 433 (1973)). The cases addressing this are uniformly decided under the framework of the Fourth Amendment, not the Second Amendment. *See Flanegan v. O'Leary*, No. 14-1379, 2015 U.S. Dist. LEXIS 121460, at *8 (W.D. Penn. 2015); *United States v. Clark*, No. 3:22cr159, 2023 U.S. Dist. LEXIS 45226, at *21 (E.D. Va. 2023); *United States v. Luviano-Vega*, No. 5:10-CR-184, 2010 U.S. Dist. LEXIS 98432, at *15 (E.D.N.C. 2010). The Fourth Circuit's opinion turns

this principle on its head, creating the possibility, under the above example, that an officer's decision to restrict access to lawfully possessed firearms during a stop would be analyzed under the Second Amendment, rather than the Fourth Amendment. Such an analysis would run afoul of established precedent, and common sense, and would create nationwide uncertainty for law enforcement.

"Traffic stops are 'especially fraught with danger to police officers', so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Rodriguez v. United States*, 575 U.S. 348, 356 (2015) (citing *Johnson*, 555 U.S. at 327-28). For this reason, officers are allowed to "exercise command of the situation" and intrude on the occupants' personal liberties to carry out the purpose of the stop and protect officer safety." *Johnson*, 555 U.S. at 330; *see also Michigan v. Summers*, 452 U.S. 692, 702-03 (1981). It has long been recognized that, "when an officer conducts a traffic stop, 'everyone in the vehicle' is seized within the meaning of the Fourth Amendment, 'even though the purpose of the stop is limited and the resulting detention is quite brief.'" *Brendlin v. California*, 551 U.S. 249, 255 (2007) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). As a passenger in the vehicle during a traffic stop, Sharpe was seized within the meaning of the Fourth Amendment.

Law enforcement must be able to exercise control over a lawfully initiated traffic stop, for their own safety and the safety of bystanders. The Fourth

Circuit's opinion in this case will have the effect of preventing or deterring officers from exercising control of traffic stops. The Fourth Amendment provides a check on law enforcement officers from exceeding their authority during the course of a traffic stop, while providing consistent and uniformly applicable standards for officers to follow. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) ("Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing[.]"). "[T]he touchstone of [the Court's] analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of the citizen's personal security.'" *Mimms*, 434 U.S. at 108-109 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). The reasonableness of a particular invasion requires a balancing test "between the public interest and the individual's right to personal security free from arbitrary influence by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

As Judge Neimeyer stated in his concurrence, "a traditional, freestanding First Amendment analysis fails to account for the fact that the communication restriction was but a component of the seizure." Pet. App. 22a. The restrictions on Sharpe's conduct during the traffic stop are squarely within those traditionally analyzed under the Fourth Amendment. The question in this case is, and should ultimately be, "whether

prohibiting livestreaming by persons seized during traffic stops was reasonable . . .” in the context of the Fourth Amendment. Pet. App. 23a.

This decision creates uncertainty for law enforcement in the exercise of their duties and creates an unnecessary burden that will impede or deter an officer’s ability to keep themselves and citizens safe. The issue presented by this case will continue to arise until this Court definitively resolves it. With the continued advancement of information sharing and livestreaming platforms, members of law enforcement are certain to encounter situations where those who are lawfully seized in a traffic stop will assert a First Amendment right to livestream their traffic stop, despite being lawfully seized. This Court should provide clarity on this issue now rather than allow this issue to remain unresolved. This Court should grant certiorari to prevent that uncertainty, and to prevent the foreseeable dangers to the law enforcement community that will follow.

C. This Case is the Ideal Vehicle for Creating Certainty in Nationwide Police Practices With Respect to Restrictions During Traffic Stops.

Independent of the role that social media can play in the threat to officer safety, traffic stops on their own are considered one of the most dangerous tasks an officer can engage in. *See e.g.*, Peter Nickeas and Emma Tucker, “Multiple attacks on officers this week illustrate the inherent dangers of traffic stops,” CNN (January 29, 2022), *available at*

https://www.cnn.com/2022/01/28/us/traffic-stops-officers-attacked/index.html. When livestreaming via social media is thrown into the mix, that danger is exponentially amplified, exposing law enforcement officers to potentially deadly threats.

One obvious potential threat to officer safety posed by livestreaming would involve stopping a vehicle with gang members or drug dealers, who may wish to livestream the traffic stop to encourage intervention by others. This scenario is not "farfetched," as claimed by Sharpe in prior briefing and argument in this case. Gangs routinely conduct activities on social media, which is known to police departments and even used by police departments as an investigative tool to research gang activity. *See*, *e.g.*, *ACLU of Tenn., Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM, 2020 WL 4819544 (Aug. 19, 2020) (holding that officers' social media searches for gang activity were part of their investigative activities); *see also* William Wan, "How emoji can kill: As gangs move online, social media can fuel violence," The Washington Post (June 13, 2018); Michael Tardim, "Gangs embrace social media with often deadly results," Associated Press (June 11, 2018). Law enforcement officers are trained that gangs routinely use social media to coordinate and publicize their activities.

By limiting an officer's ability to exercise control of a traffic stop, the Fourth Circuit's opinion puts law enforcement officers in this country at great risk. This Court should grant Petitioner's petition, reverse the Fourth Circuit's decision in this case, and clarify that

traditional Fourth Amendment analysis is the proper standard of review where there is a challenge to the temporary restriction of rights during the course of a lawful seizure.

D. Review by this Court is Necessary to Provide Clarity on the Distinction Between Bystanders and Seized Individuals in the Application of the First and Fourth Amendments.

The difference between the restriction of bystander livestreaming and restriction on livestreaming by a passenger in a seized vehicle is a critical one that determines whether the First or Fourth Amendment analysis applies. Some Courts of Appeal have recognized that members of the public and the press have a right to access information about their officials' public activities, and that this right extends to the ability of "bystanders" to record or photograph police activities in public. *See, e.g., Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Fields v. City of Philadelphia*, 862 F.3d 353 (3rd Cir. 2017); *Askins v. United States Dep't of Homeland Sec.*, 899 F.3d 1035 (9th Cir. 2018); *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *but see Molina v. City of St. Louis*, 59 F.4th 334 (8th Cir. 2023) (right of a bystander to record policy activity was not clearly established). While these cases all analyze the restriction on documenting law enforcement under the First Amendment, none of them address the right of a *lawfully seized individual* to record his encounter with law enforcement.

A bystander is a third-party observer, *see Bystander*, Black's Law Dictionary (11th ed. 2019) ("Someone who is present when an event takes place, but who does not become directly involved"). In the context of the above cases a bystander is a third-party observer of police activity but who is not directly involved. The common thread of the above bystander cases is that none of the of the plaintiffs who brought allegations related to their First Amendment right to record were in custody, occupants of a stopped vehicle, or otherwise seized by a law enforcement officer at the time of the act of recording.

When an individual is the subject of a seizure, as Sharpe was here, the First Amendment bystander analysis is no longer applicable. Rather than being a third-party observer of police activity, Sharpe was the subject of that activity. He was therefore brought under the umbrella of the Fourth Amendment and any restrictions on his behavior should be analyzed as such.

E. A Prohibition on Livestreaming During a Traffic Stop Passes First Amendment Scrutiny.

Even if it was proper to reach the constitutionality of the Town's policy before determining the constitutionality of the officers' actions, a prohibition on livestreaming during the course of a traffic stop is a reasonable time, place, and manner restriction as a matter of law. The First Amendment generally "prohibit[s] the government from limiting the stock of information from which members of the public may

draw," *see First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978); *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017) , so long as it is gathered "by means within the law." *See Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quotation omitted); *Glik*, 655 F.3d at 82. "Gathering information about government officials in a form that can be readily disseminated serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (quoting *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966)).

Although a traffic stop takes place in a public forum, members of the public are not generally allowed to participate in a traffic stop. For example, in *Glik*, the bystander plaintiff "filmed [the officers] from a comfortable remove" and "neither spoke to nor molested them in any way" (except in directly responding to the officers when they addressed him). 655 F.3d. at 84. "Peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation," but that is not the case here. *See id.*

In the circuits where a "right to record police" has been found, the right is subject to reasonable time, place, and manner restrictions, as with any non-content-based regulation of public speech. *See Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.), *cert. denied*, 531 U.S. 978 (2000) (recognizing a "First Amendment right, subject to reasonable time, manner

and place restrictions, to photograph or videotape police conduct"); *accord Turner*, 848 F .3d at 690 (Fifth Circuit); *Fields*, 862 F.3d at 353 (Third Circuit); *Gericke*, 753 F.3d at 9 (First Circuit); *Amer. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012); *Glik*, 655 F.3d at 84 (First Circuit).

As detailed by the First Circuit in *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (2021), this Court has not indicated that the 'forum based' approach that is used to evaluate a "regulation of speech on government property," necessarily applies to a regulation on the collection of information on public property. 982 F.3d at 835. Rather, instead of the strict scrutiny analysis applied when evaluating speech restrictions in a traditional public forum, an intermediate scrutiny standard should apply. *Id.* at 835-36; *accord Alvarez*, 679 F.3d at 604. This means that the policy should be narrowly tailored to further a substantial government interest, although it need not be the least restrictive means of achieving the government's interests. *Id.* at 836. After all, "the government is under no obligation to permit a type of newsgathering that would interfere with police officers' ability to do their jobs." *Id.*

A prohibition on livestreaming law enforcement encounters is content neutral. "A principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "A regulation that serves

purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* The district court found that, "viewing the pleadings in the light most favorable to Sharpe, the alleged policy prohibited livestreaming a police encounter from inside the stopped car during the traffic stop." Pet. App. 42a. Such a policy would apply regardless of the content of the speech during the course of the livestream.

A prohibition on livestreaming officers during traffic stops or other lawful seizures leaves open ample alternative channels for communication. Such a restriction would still allow people to record officers and upload the videos immediately following the interaction. Such a *de minimis* restriction would not be so restrictive as to outweigh the serious risk to officer safety. To the person filming the officers, there is no meaningful distinction between livestreaming and uploading a video the second the officer leaves. To the officers, this delay may be a matter of life and death.

Recently, a preliminary report by the FBI showed that intentional killings of police are at the highest level since 1995. *See* Emma Tucker and Priya Krishnakumar, "Intentional killings of law enforcement officers reach 20-year high, FBI says," CNN (Jan. 13, 2022), *available at*: https://www.cnn.com/2022/01/13/us/police-officers-line-of-duty-deaths/index.html. The safety concerns to officers during traffic stops are significant. This Court

has correspondingly recognized that the liberties of persons seized during traffic stops must sometimes be restricted for officers to control the situation, accomplish the goal of the investigative stop, and maintain safety. As noted by the district court in this case, the pleadings and case law demonstrate that the Town's alleged policy serves officer and public safety, because "a review of Sharpe's video indicates that Sharpe's livestreaming from inside the stopped car permitted live broadcast from inside the car of the officers' movements, the perspective from within the stopped car, real-time comments from viewers, and geolocation data, [which] undermine an officer's ability to exercise "command of" the traffic stop, thereby increasing the risks to officers and the public. Pet. App. 40a.

As discussed above, the risk of harm to both the police during a traffic stop and the occupants of the stopped vehicle is minimized, if the officers routinely exercise unquestioned command of the situation. *See Maryland v. Wilson*, 519 U.S. at 414 (citations omitted). That safety-based interest justifies, among other conditions, ordering the driver and passengers to get out of the vehicle pending completion of the stop. *Id.* Officers may seize any weapons or contraband in plain view, even if unrelated to the purpose of the stop. *See Michigan v. Long*, 463 U.S. 1032, 1049 (1983) . If there is reasonable suspicion that any occupant may be armed and dangerous, the officer may also perform a pat-down or frisk of that person or search areas in the passenger compartment of a vehicle where a weapon may be hidden. *Id.* at

1049-50. During the stop, the officers may ask passengers to identify themselves and ask them questions unrelated to the justification for the stop, so long as they do not measurably extend the duration of the stop. *Arizona v. Johnson*, 555 U.S. at 333. The occupants, including passengers, are not free to terminate the encounter or move about at will. *Id.* Once a lawful stop begins, the temporary seizure and these *de minimis* restrictions on personal liberties are considered reasonable until the stop ends. *Id.* In fact, the Fourth Circuit has held that, "a brief but complete restriction of liberty is valid during a routine traffic stop.") *United States v. Jones*, 27 Fed. App'x 198, 200 (4th Cir. 2001), (*citing United States v. Moore*, 817 F.2d 1105, 1108 (4th Cir. 1987).

A content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). An ordinance is narrowly tailored if it "'promotes a substantial government interest" and "does not burden substantially more speech than is necessary to further the government's legitimate interests." *Ross v. Early*, 746 F.3d 546, 552 (4th Cir. 2014); *see also Ward*, 491 U.S. at 798-99). It is well-established that the government has a substantial, weighty, and legitimate interest in officer safety. *See United States v. Stanfield*, 109 F.3d 976, 979-80 (4th Cir. 1997); *Wilson*, 519 U.S. at 412-14

(stating that the public interest in officer safety is "both legitimate and weighty"); *Rodriguez*, 575 U.S. at 356-57; *Johnson*, 555 U.S. at 330-32; *Long*, 463 U.S. at 1047-48.

Further, the alleged policy is sufficiently limited in scope and duration that it is narrowly tailored – it "does not burden substantially more speech than is necessary to further the government's legitimate interests." The alleged policy prohibits livestreaming from inside a stopped car during a traffic stop, but, as the district court reasoned, the alleged policy "does not prohibit a person who is not the subject of the traffic stop and who is not inside the stopped car from recording and livestreaming the traffic stop." Pet. App. 42a. Likewise, the alleged policy, "does not ban recording police officers from inside the stopped car during the traffic stop." *Id.* Accordingly, "[o]n its face, the [p]olicy does no more than target and eliminate the exact source of the evil it seeks to remedy." *Id.* (citing *Ross*, 746 F.3d at 557; *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

The prohibition on livestreaming merely delays uploading a recording until the traffic stop has been concluded. Plaintiff would still have access to the social media platform and "ample channels" for Plaintiff's intended expression after the conclusion of the stop. This would be analogous to the time it might take officers to move protestors from the street to a designated protest area and consistent with constitutionally permissible limitation of access to part of a public forum.

The alleged policy prohibiting livestreaming by vehicle occupants for the duration of a traffic stop is a reasonable time, place and manner restriction that is content-neutral and narrowly tailored in service of a substantial government interest – officer safety. Accordingly, the alleged policy and Officer Helms' acts enforcing it did not violate Plaintiff's First Amendment rights.

As such, this Court should reverse the Fourth Circuit's decision, as the alleged policy prohibiting livestreaming from within a seized vehicle is a reasonable time, place, and manner restriction as a matter of law.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

DAN M. HARTZOG JR.
Counsel of Record
KATHERINE BARBER-JONES
RACHEL G. POSEY
HARTZOG LAW GROUP LLP
2626 Glenwood Avenue
Suite 305
Raleigh, North Carolina 27608
Telephone: (919) 670-0338
dhartzogjr@hartzoglawgroup.com

Counsel for Petitioners Winterville Police Department, Officer William Blake Ellis, in his official capacity only, and Officer Myers Parker Helms IV, both individually and in his official capacity

SEPTEMBER 2023

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DATED FEBRUARY 7, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1827

DIJON SHARPE,

Plaintiff-Appellant,

v.

WINTERVILLE POLICE DEPARTMENT; WILLIAM BLAKE ELLIS, IN HIS OFFICIAL CAPACITY ONLY; MYERS PARKER HELMS, IV, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Defendants-Appellees.

NATIONAL POLICE ACCOUNTABILITY PROJECT; THE INSTITUTE FOR JUSTICE; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW FIRST AMENDMENT CLINIC; THE DUKE UNIVERSITY SCHOOL OF LAW FIRST

Appendix A

AMENDMENT CLINIC; ELECTRONIC PRIVACY INFORMATION CENTER; ELECTRONIC FRONTIER FOUNDATION; CATO INSTITUTE,

Amici Supporting Appellant.

SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION,

Amicus Supporting Appellees.

October 27, 2022, Argued
February 7, 2023, Decided

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.
(4:19-cv-00157-D).
James C. Dever III, District Judge.

Before NIEMEYER and RICHARDSON, Circuit Judges, and Michael S. NACHMANOFF, United States District Judge for the Eastern District of Virginia, sitting by designation.

RICHARDSON, Circuit Judge:

This case asks whether a town's alleged policy that bans video livestreaming certain interactions with law enforcement violates the First Amendment. It also asks whether a police officer who, during a traffic stop, attempted to stop a passenger from livestreaming the encounter may be successfully sued under § 1983 for violating the passenger's First Amendment rights.

On the first question, Defendants have thus far failed to establish that the alleged livestreaming policy is sufficiently grounded in, and tailored to, strong governmental interests to survive First Amendment scrutiny. So we vacate the district court's order declaring the policy constitutional and remand for further proceedings. But on the second question, we affirm the district court's order holding that qualified immunity protects the officer. When the stop occurred, it was not clearly established that the officer's actions violated the passenger's First Amendment rights. So qualified immunity bars that claim.

I. Background

Officer Myers Helms of the Winterville Police Department tried to stop passenger Dijon Sharpe from livestreaming his own traffic stop. [J.A. 9-10, 34-35.] Sharpe started streaming to Facebook Live shortly after the car he was riding in was pulled over. [J.A. 9.] Officer Helms noticed this activity and attempted to take Sharpe's phone, reaching through Sharpe's open car window. [J.A. 9, 55, 75.] Officer Helms and his partner Officer William Ellis then told Sharpe he could record the stop but could not stream it to Facebook Live because that threatened officer safety. The officers also made it clear that if Sharpe tried to livestream a future police encounter, he would have his phone taken away or be arrested.[1] [J.A. 9-10, 34-35.]

1. When asked whether this was a law, Officer Ellis responded, "That's the RDO," J.A. 34, likely referring to N.C. Gen. Stat. Ann. § 14-233, a statute that criminalizes "resisting, delaying, or obstructing" an officer.

Sharpe sued under 42 U.S.C. § 1983. He sued the officers in their official capacities—effectively suing the Town of Winterville—for allegedly having a policy that prohibits recording and livestreaming public police interactions in violation of the First Amendment.[2] [J.A. 10.] He also sued Officer Helms in his individual capacity. [J.A. 11.] The district court awarded Defendants judgment on the pleadings after finding that the policy, as alleged, did not violate the First Amendment.[3] [J.A. 78-86.] And the court dismissed the individual-capacity claim against Officer Helms as barred by qualified immunity. [J.A. 59-66.]

II. Discussion

Sharpe plausibly alleges that the Town of Winterville has a policy preventing someone in a stopped vehicle from livestreaming their traffic stop. If that policy exists, it reaches protected speech. So to survive First Amendment scrutiny, the Town needs to justify the alleged policy by

---

2. *See Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) ("Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 n.55 (1978))). Sharpe also sued the Winterville Police Department. [J.A. 10.] But the district court dismissed this claim, finding the Winterville Police Department could not be sued under North Carolina law. [J.A. 57-59.] Sharpe has not appealed this dismissal.

3. We use "Defendants" to refer to the officers in their official capacities and, effectively, the Town.

proving it is tailored to weighty enough interests. The Town has not yet met that burden. So Sharpe's claim that the Town's livestreaming policy violates the First Amendment survives.

Sharpe also appeals the district court's dismissal of his individual-capacity claim against Officer Helms. He asserts that it was clearly established that Officer Helms's actions violated his First Amendment rights. So, he says, Officer Helms is not immune. We disagree. At the time of Sharpe's traffic stop, it was not clearly established that the First Amendment prohibited an officer from preventing a passenger who is stopped from livestreaming their traffic stop. Officer Helms is therefore entitled to qualified immunity, and Sharpe's individual-capacity claim was properly dismissed.

A. Sharpe Plausibly Alleges a First Amendment Violation

For his claim against the Town to survive the pleading stage, Sharpe need only plausibly allege (1) that the Town has a policy preventing a passenger from livestreaming their traffic stop and (2) that such a policy violates his First Amendment rights.[4] He has done so.

---

4. At this stage of the litigation, we are merely testing the sufficiency of the complaint, not resolving its merits or any factual disputes. *See Massey v. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014). So long as Sharpe has pleaded enough facts that, when assumed to be true, state a plausible First Amendment violation, then his official-capacity claim should survive Defendants' Rule 12(c) challenge. *See id.; Owens v. Balt. City State's Attys. Office*, 767

Sharpe must first plausibly allege that the Town has a policy or custom barring a car's occupant from livestreaming their traffic stop. The Town, as a local government, is only "liable under § 1983 for its own violations of federal law." *L.A. County v. Humphries*, 562 U.S. 29, 36, 131 S. Ct. 447, 178 L. Ed. 2d 460 (2010). So unless Sharpe's alleged injury came from executing a Town "policy or custom," the Town cannot be sued under § 1983. *Monell*, 436 U.S. at 694 ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

Sharpe has alleged that the Town has a policy that prohibits an occupant from livestreaming their own traffic stop. And Sharpe's allegation is plausible.[5] He supports his

---

F.3d 379, 403 (4th Cir. 2014) ("Although prevailing on the merits of a *Monell* claim is difficult, simply alleging such a claim is, by definition, easier . . . The recitation of facts need not be particularly detailed, and the chance of success need not be particularly high.").

5. Sharpe alleges a broader policy that prevents both "recording and livestreaming" and reaches all public interactions with police. J.A. 11. Yet it is implausible that the Town's policy prevents recording without livestreaming. The officers made it clear that Sharpe was free to record, he just could not livestream. So he has plausibly alleged a policy that bars livestreaming, but not one that bars only recording. He thus lacks standing to seek, as he does, a declaration that "he has a First Amendment-protected right to record police officers in the public performance of their

allegation by asserting: (1) Officer Helms tried to seize his phone upon learning Sharpe was streaming to Facebook Live; (2) Officer Ellis said that in the future if Sharpe broadcasts on Facebook Live his phone will be taken from him and, if Sharpe refuses to give up his phone, he will go to jail; and (3) both officers justified their efforts to prevent livestreaming using the same officer-safety rationale. It is a reasonable inference that absent a policy the two officers would not have taken the same course, for the same reason, nor would those officers have known in advance that Sharpe would face the same treatment if he tried to livestream another officer in the future. S*ee Mays v. Sprinkle*, 992 F.3d 295, 299 (4th Cir. 2021) (reminding

---

duties." J.A. 11; *see Los Angeles v. Lyons*, 461 U.S. 95, 105-06, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210, 210 L. Ed. 2d 568 (2021). And while he may plausibly allege that the policy reaches all public police interactions, we know that if the policy exists it covers Sharpe's circumstances. Since that is enough for Sharpe to prevail here, that is the only scenario we consider.

Additionally, Sharpe's complaint technically alleges that the Winterville Police Department has this alleged policy and not the Town. [J.A. 11.] But *Monell* liability, by definition, requires that the policy be attributable to the municipality itself—including via an individual or entity that has final policymaking authority for the municipality. *See Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 469-70 (4th Cir. 2013); *Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, 28 F.4th 529, 533 (4th Cir. 2022). And Sharpe brings a *Monell* claim challenging the Police Department's policy. So he is really alleging that the Winterville Police Department's allegedly unconstitutional policy is attributable to the Town. *See Spell v. McDaniel*, 824 F.2d 1380, 1394-95 (4th Cir. 1987) (assessing whether a police chief was a final policymaker for *Monell* liability).

us that at this stage we must draw "all reasonable factual inferences in plaintiff's favor").[6]

But plausibly alleging a policy is not enough. The policy that Sharpe alleges must also violate the First Amendment. In other words, livestreaming one's own traffic stop must be protected speech, and barring it must impermissibly abridge that speech. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); *Wood v. Moss*, 572 U.S. 744, 757, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014). Sharpe bears the burden to show that his protected speech was restricted by governmental action. *See Reynolds v. Middleton*, 779 F.3d 222, 226 (4th Cir. 2015). The burden then shifts to the government to prove the speech restriction is constitutionally permissible. *Id.*

Sharpe has met his initial burden by showing that the alleged policy restricts his protected speech. Creating and disseminating information is protected speech under the First Amendment. *Sorrell v. IMS Health Inc.*, 564 U.S.

---

6. That Officer Ellis seemingly claimed to be acting under North Carolina's statute prohibiting resisting, delaying, or obstructing an officer does not change this analysis. Even if Officer Ellis thought his authority to seize Sharpe's phone or arrest him came from this statute, it is still a plausible inference that he could only know the statute would enable these sanctions if there was a policy to prevent livestreaming. To know in advance that livestreaming would be treated as obstruction or that Sharpe would be ordered to stop livestreaming and so face arrest for resisting that order still suggests that there is a policy against livestreaming.

552, 570, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011). "'[A] major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs.'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam)). And other courts have routinely recognized these principles extend the First Amendment to cover recording—particularly when the information involves matters of public interest like police encounters. *See, e.g., Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) ("The act[] of . . . recording videos [is] entitled to First Amendment protection because [it is] an important stage of the speech process that ends with the dissemination of information about a public controversy."). We agree. Recording police encounters creates information that contributes to discussion about governmental affairs. So too does livestreaming disseminate that information, often creating its own record. We thus hold that livestreaming a police traffic stop is speech protected by the First Amendment.

But not all regulation of protected speech violates the First Amendment. The burden now flips to Defendants. And the Town's speech regulation only survives First Amendment scrutiny if Defendants demonstrate that: (1) the Town has weighty enough interests at stake; (2) the policy furthers those interest; and (3) the policy is sufficiently tailored to furthering those interests. *See Reynolds*, 779 F.3d at 228-29.[7]

7. The exact formulation of how weighty these interests must be varies according to what type of regulation is at issue. *Compare Am. Ass'n of Pol. Consultants, Inc. v. FCC*, 923 F.3d

To meet this burden here, Defendants may point to common sense and caselaw to establish that the Town has a valid interest, and can rely on any "obvious" connection between the asserted interest and the challenged regulation to show that their policy was appropriately "tailored" to that interest. *See id.* at 227-228, 228 n.4. But "mere conjecture" is inadequate to carry their burden. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000). Defendants must demonstrate that the Town's policy passes First Amendment scrutiny or else Sharpe's allegation is plausible and his claim survives at this stage. *See McCutcheon v. FEC*, 572 U.S. 185, 211, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014) (reversing dismissal of First Amendment claim because government had "not carried its burden of demonstrating" its regulation furthered its asserted interest).[8]

159, 167 (4th Cir. 2019) (content-based restrictions are upheld only if "narrowly tailored to further a compelling governmental interest"), *with City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1475-76, 212 L. Ed. 2d 418 (2022) (content-neutral restrictions are upheld only if "narrowly tailored to serve a significant governmental interest" (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989))). But the burden remains on the government regardless of the regulation's classification.

8. *See also Billups v. City of Charleston*, 961 F.3d 673, 690 (4th Cir. 2020) (declaring speech restriction unconstitutional after a bench trial because government "failed to provide evidence" of sufficient tailoring); *Indep. News, Inc. v. City of Charlotte*, 568 F.3d 148, 157 (4th Cir. 2009) (upholding grant of partial judgment on the pleadings because government had a "sufficient evidentiary basis"

The Town purports to justify the policy based on officer safety. [Appellees' Response Brief at 55.] According to Defendants, livestreaming a traffic stop endangers officers because viewers can locate the officers and intervene in the encounter. [J.A. 9.] They support this claim by arguing, with help from amici, that violence against police officers has been increasing—including planned violence that uses new technologies. [*See, e.g.*, Amicus Brief of the Southern States Police Benevolent Association at 9.] On Defendants' view, banning livestreaming prevents attacks or related disruptions that threaten officer safety.

This officer-safety interest might be enough to sustain the policy. But on this record we cannot yet tell. There is "undoubtedly a strong government interest" in officer safety. *Riley v. California*, 573 U.S. 373, 387, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). And risks to officers are particularly acute during traffic stops. *See Maryland v. Wilson*, 519 U.S. 408, 414, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997); *Michigan v. Long*, 463 U.S. 1032, 1047, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).[9] But even though the Town

---

to justify speech restriction); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002) (affirming in part preliminary injunction because government "produced no evidence" speech restriction furthered its interest).

9. Our citation to Fourth Amendment caselaw throughout this opinion does not mean that Fourth Amendment standards determine the outcome.

Government action may pass scrutiny under the Fourth Amendment but still offend the First. *See, e.g., Trulock v. Freeh*, 275 F.3d 391, 403-06 (4th Cir. 2001) (holding that officer-defendants

has a strong interest in protecting its officers, Defendants have not done enough to show that this policy furthers or is tailored to that interest. Nor is that gap filled here by common sense or caselaw. *See Reynolds*, 779 F.3d at 228-29. So we cannot conclude, at this stage, that the policy survives First Amendment scrutiny. *See Billups*, 961 F.3d at 687.[10] Instead, we hold that Sharpe has plausibly alleged

---

enjoyed qualified immunity on Fourth Amendment claims but not First Amendment claims). The Fourth and First Amendments do not *authorize* government actions. They *limit* them. So finding that certain police intrusions on liberty comply with the Fourth Amendment does not bless those actions as permissible restraints on speech. *See Tobey v. Jones*, 706 F.3d 379, 390 n.5 (4th Cir. 2013) (finding "no authority for [the] argument that government action that is reasonable within the meaning of the Fourth Amendment is necessarily therefore reasonable for purposes of First Amendment analysis").

At the same time, the governmental interests relevant to a Fourth Amendment inquiry can be relevant to a First Amendment inquiry. *See Sause v. Bauer*, 138 S. Ct. 2561, 2562-63, 201 L. Ed. 2d 982 (2018) (per curiam) (illustrating that Fourth Amendment interests can be critical to resolving First Amendment questions); *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972), 92 S. Ct. 2125, 32 L. Ed. 2d 752 (recognizing that sometimes there can be "a convergence of First and Fourth Amendment values"). And here the interests that animate some Fourth Amendment cases bear on the governmental interest in this First Amendment arena.

10. At this stage, the claim survives whether the policy is content-neutral or content-based. So we need not decide whether the district court properly found the policy to be content neutral and applied intermediate scrutiny. On remand, the district court will be able to consider the policy's nature as more information about it is revealed.

that the Town adopted a livestreaming policy that violates the First Amendment.

B. Officer Helms is Entitled to Qualified Immunity

Having determined that the official-capacity claim against the Town must survive, we turn to the individual-capacity claim against Officer Helms. When a government official is sued in their individual capacity, qualified immunity protects them "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). To determine whether qualified immunity applies, we ask both "whether a constitutional violation occurred" and "whether the right violated was clearly established" at the time of the official's conduct. *Melgar ex rel. Melgar v. Greene*, 593 F.3d 348, 353 (4th Cir. 2010).

A right can be clearly established by cases of controlling authority in this jurisdiction or by a consensus of persuasive authority from other jurisdictions. *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 280 (4th Cir. 2004). Either way, these sources "must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018) (per curiam) (quoting *White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (per curiam)). This standard does not require "a case directly on point." *Id.* But the right's contours must be "sufficiently clear that a

reasonable official would understand that what he is doing violates that right.'" *Cannon v. Vill. of Bald Head Island*, 891 F.3d 489, 497 (4th Cir. 2018) (quoting *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 313 (4th Cir. 2006)).

So we must define the right at issue with specificity. *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503, 202 L. Ed. 2d 455 (2019). And the particulars matter. A reasonable officer will be unable to "determine how the relevant legal doctrine . . . will apply to the factual situation" if the circumstances differ too much from prior cases. *See Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam) (quoting *Saucier v. Katz*, 533 U.S. 194, 205, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)).

The First Amendment right here is a passenger's alleged right to livestream their own traffic stop. And there is no "controlling authority" in this jurisdiction that establishes Sharpe had this right when his car was pulled over. *See Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 (4th Cir. 2017). Sharpe's attempt to construct such controlling authority fails. He cites an array of cases from various contexts, including from election law, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011), access to the courts, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980), and medical data, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011). These cases provide general guidance about First Amendment doctrine. But they offer no concrete direction to the reasonable officer

tasked with applying that doctrine to the situation Officer Helms confronted. So they do not clearly establish the specific right at issue. *See Mullenix*, 577 U.S. at 12.

Nor is there any consensus of persuasive authority to establish this right. *See Lott*, 372 F.3d at 280. None of Sharpe's out-of-jurisdiction case citations address a passenger livestreaming a police officer during their own traffic stop. Instead, they generally are about video recordings, not livestreams. *See, e.g., Turner v. Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017) (discussing the "right to record the police"). And the people doing the recording tend to be bystanders, not the subjects of the stop itself. *See, e.g., Fields v. City of Philadelphia*, 862 F.3d 353, 359-60 (3d Cir. 2017) (discussing "bystander videos").

Here, those two distinctions make all the difference. The constitutionality of a speech restriction rests on balancing interests. A different balance is struck when an officer prevents a bystander from recording someone else's traffic stop than when the officer prevents a passenger from livestreaming their own stop. *See, e.g., Long*, 463 U.S. at 1047-48 (explaining that officers often face increased risk during traffic stops from passengers in the stopped vehicles); J.A. 34 (officers asserting that livestreaming was more dangerous to law enforcement than recording). Without a consensus of cases barring the latter, Sharpe cannot show that a reasonable official in Officer Helms's shoes would understand that his actions violated the First Amendment. *See Cannon*, 891 F.3d at 497.[11]

11. For the same reason, we cannot accept Sharpe's attempt to broadly define the right as "a First Amendment right to film

Qualified immunity protects Officer Helms unless it was clearly established at the time of the traffic stop that forbidding a passenger from livestreaming their own traffic stop violated the First Amendment. Here, no precedent in this Circuit nor consensus of authority from the other Circuits established that Officer Helms's actions were unconstitutional. The district court was thus correct to dismiss the § 1983 claim against him in his individual capacity.

* * *

Plaintiffs seeking redress under § 1983 for a violation of their constitutional rights must walk through a narrow gate. The doctrines of qualified immunity and *Monell* liability for local governments substantially diminish their chances. Both doctrines are controversial. They have been criticized for being atextual, ahistorical, and driven by policy considerations.[12] But they are also binding.

---

police in the discharge of their duties in public" that "ha[s] no blanket carve-out for vehicle passengers and no special exception for live broadcasting." Appellant's Reply at 1. Such framing contravenes the Supreme Court's admonition to avoid defining the right at too high a level of generality. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

12. For criticism of qualified immunity, *see, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870-72, 198 L. Ed. 2d 290 (2017) (Thomas, J., concurring in part and concurring in the judgment); William Baude, *Is Qualified Immunity Unlawful*, 106 CAL. L. REV. 45 (2018). For criticism of *Monell* liability, *see, e.g., City of Oklahoma City v. Tuttle*, 471 U.S. 808, 835-38, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (Stevens, J., dissenting); David H. Gans, *Repairing Our*

Here, faithful application of the doctrines leads to divergent results. On the one hand, Sharpe's official-capacity claim can proceed. He has sufficiently alleged that the Town has a policy barring livestreaming one's own traffic stop that violates the First Amendment. He must now show this policy exists. And, if it does, the Town will have the chance to prove that it does not violate the First Amendment. On the other hand, although Officer Helms was allegedly acting under the policy that plausibly violates the First Amendment, Sharpe's claim against him in his personal capacity fails. It was not clearly established that Officer Helms's actions violated Sharpe's First Amendment rights and so he is protected by qualified immunity.

VACATED IN PART,
AFFIRMED IN PART,
AND REMANDED.

System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983, 2022 CARDOZO L. REV. DE NOVO 90, 108-14 (2022). A more textual and historical analysis of § 1983 may still yield some protection for officials and municipalities. *See, e.g.*, David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2185-86 (2005); Larry B. Kramer & Alan O. Sykes, *Municipal Liability under 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 262 (1987); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1864-70 (2018).

NIEMEYER, Circuit Judge, concurring in the judgment:

I agree with the holding of the majority opinion that Officer Myers Helms is entitled to qualified immunity. I also agree that a remand is in order to determine whether the Town of Winterville had a policy prohibiting livestreaming by persons detained and, if it did, whether the policy is unconstitutional. I write separately because the majority opinion hardly acknowledges the role of the Fourth Amendment in the relevant analysis and the relationship of the Fourth Amendment to other constitutionally protected rights, including First Amendment rights. Yet, the issues in this case arose in the context of a lawful Fourth Amendment seizure — a traffic stop — during which a person seized refused to obey the order of law enforcement officers to cease using a cell phone to communicate with others during the course of the stop. The restriction on cell-phone use *was thus an aspect of the seizure*, and therefore the lawfulness of the restriction is regulated by the Fourth Amendment and its jurisprudence recognizing that, when conducting traffic stops, law enforcement officers may intrude on the liberty interests of those who have been stopped, so long as the intrusion is *reasonable*.

The issue therefore should be restated, I submit, to whether, during a lawful traffic stop, law enforcement officers may lawfully prohibit the person detained from conducting electronic communications with others. This is a nuanced, but meaningful, adjustment to the issue addressed in the majority opinion, which is whether restrictions on electronic communications of persons

detained are justified under a traditional, free-standing First Amendment analysis. While the two analyses might, but need not, lead to the same conclusion, I believe that we should apply the reasonableness test of the Fourth Amendment because the restrictions about which the plaintiff complains were imposed as a part of a lawful Fourth Amendment seizure.

I

The factual context is routine but is important to demonstrate my point. On October 9, 2018, Officer William Ellis and Officer Helms conducted a lawful traffic stop of a vehicle driven by Juankesta Staton, in which Dijon Sharpe was a passenger. At the beginning of the stop, Sharpe, as alleged in his complaint, "turned on the video recording function of his smartphone and began livestreaming — broadcasting in real-time — via Facebook Live to his Facebook account," which reached a live audience and provoked live responses. One viewer posted, "Be Safe Bro!" and another asked, "Where y'all at." Other comments included "SWINE" and "They don't like you Dijon." Those viewing the livestream could hear Staton say that the police had been following them for some time and that they had been racially profiled — that the officers had "seen two black people, and . . . [t]hey thinking drug dealer. . . . That's called harassment."

During the stop, Officer Helms told Sharpe, "We ain't gonna do Facebook Live, because that's an officer safety issue." At the same time, he attempted to grab Sharpe's phone, but Sharpe moved it further inside the

vehicle, out of Helms's reach, and stated, apparently to his Facebook Live audience, "Look at your boy. Look at your boy." Officer Ellis then addressed Sharpe's livestreaming, stating to both Staton and Sharpe, "In the future, guys, this Facebook Live stuff, . . . we're not gonna have, okay, because that lets everybody y'all follow on Facebook [know] that we're out here. There might be just one [officer] next time . . . [and] [i]t lets everybody know where y'all are at. We're not gonna have that." Officer Ellis continued, "If you were recording, that is just fine. . . . We record, too," but "in the future, if you're on Facebook Live, your phone is gonna be taken from you, . . . [a]nd if you don't want to give up your phone, you'll go to jail." When Staton explained that Sharpe was using Facebook Live because they didn't "trust . . . cops," Officer Ellis sympathized with the concerns, but nonetheless reiterated, "[Y]ou can record on your phone . . . but Facebook Live is not gonna happen."

A little over a year after the stop, Sharpe commenced this action under 42 U.S.C. § 1983 against the Winterville Police Department and both officers, alleging that the defendants had violated his First Amendment rights by seeking to enforce a prohibition against livestreaming during traffic stops. On the defendants' motion, the district court dismissed Sharpe's claim against Officer Helms in his individual capacity on the ground that Helms was entitled to qualified immunity, explaining that "Sharpe's right to record and real-time broadcast his encounter with police" while he was "a passenger in a stopped vehicle" was not "clearly established on October 9, 2018." The court also dismissed Sharpe's claims against the officers in their

official capacities, concluding that the First Amendment did not entitle an individual who was the subject of a lawful Fourth Amendment seizure to livestream the stop while it was in process.

II

The narrow activity on review before us is an officer's prohibiting a person detained from livestreaming the encounter while detained. And with respect to the individual capacity claim against Officer Helms, we must ask whether every reasonable officer would know that imposing such a restriction as part of the seizure made during a traffic stop was unlawful, *i.e.*, whether clearly established law made it so. *See, e.g., District of Columbia v. Wesby*, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018). That question can be addressed only in the context of what a reasonable officer knows about the broader activity from clearly established law and whether, during a traffic stop, he can take control of the situation by imposing certain restrictions for purposes of officer safety, including restrictions on electronic communications.

At the time of the traffic stop in this case, it was clearly established to every reasonable police officer that when an officer conducts a traffic stop, "everyone in the vehicle" is seized within the meaning of the Fourth Amendment, "'even though the purpose of the stop is limited and the resulting detention quite brief.'" *Brendlin v. California*, 551 U.S. 249, 255, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)). A reasonable officer also

knew that "whenever police officers use their authority to effect a stop, they subject themselves to a risk of harm." *United States v. Robinson*, 846 F.3d 694, 698 (4th Cir. 2017) (en banc). Traffic stops in particular, the Supreme Court has long emphasized, are "especially fraught with danger to police officers." *Michigan v. Long*, 463 U.S. 1032, 1047, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983); *see also Pennsylvania v. Mimms*, 434 U.S. 106, 110, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (recognizing the "inordinate risk confronting an officer as he approaches a person seated in an automobile"). "[T]he risk of a violent encounter in a traffic-stop setting 'stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop.'" *Arizona v. Johnson*, 555 U.S. 323, 331, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009) (quoting *Maryland v. Wilson*, 519 U.S. 408, 414, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997)). And when a traffic stop involves one or more passengers, that fact only "increases the possible sources of harm to the officer," as "the motivation of a passenger to employ violence . . . is every bit as great as that of the driver." *Wilson*, 519 U.S. at 413, 414.

Every reasonable officer also knew at the time of this stop that to lower the risk inherent in all traffic stops, the officer is authorized to "*routinely exercise unquestioned command of the situation*." *Wilson*, 519 U.S. at 414 (emphasis added) (quoting *Michigan v. Summers*, 452 U.S. 692, 703, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981)); *see also Johnson*, 555 U.S. at 330. To this end, clearly established law informed officers that they may take reasonable steps to protect themselves during traffic stops, *even if such*

steps intrude on the liberty interests of those who have been stopped. For instance, the Supreme Court has held that "as a matter of course," police officers may order the driver and all passengers of a lawfully stopped vehicle "to get out of the car pending completion of the stop," reasoning that the government's "legitimate and weighty" interest in "officer safety" outweighs the "minimal" "additional intrusion" that such an order imposes on the vehicle's occupants. *Wilson*, 519 U.S. at 410, 412, 415 (cleaned up); *see also Johnson*, 555 U.S. at 331-32. It has also held that police officers may frisk *any occupant* of the stopped vehicle whom the officer reasonably suspects of being armed and dangerous, precisely because the vehicle's occupants, unlike any nearby bystanders, are subject to "a lawful investigatory stop." *Johnson*, 555 U.S. at 327; *see also Robinson*, 846 F.3d at 696 ("[A]n officer who makes a lawful traffic stop and who has a reasonable suspicion that one of the automobile's occupants is armed may frisk that individual for the officer's protection and the safety of everyone on the scene"). Similarly, it has held that "an officer [may] search a vehicle's passenger compartment when he has reasonable suspicion that an individual . . . is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.'" *Arizona v. Gant*, 556 U.S. 332, 346-47, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) (quoting *Long*, 463 U.S. at 1049).

Finally, every reasonable officer knew by clearly established law that the standard for assessing such intrusions on personal liberty during traffic stops is "reasonableness." *Wilson*, 519 U.S. at 411 ("[T]he touchstone of [the] analysis under the Fourth Amendment

is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (quoting *Mimms*, 434 U.S. at 108-09)).

In this case, Officer Helms and Officer Ellis indeed invoked "officer safety" as the reason why they sought, during the stop, to prohibit Sharpe from livestreaming while the stop was ongoing. Providing further explanation as to why it was reasonable for him to perceive officer safety as being implicated, Officer Helms asserts that livestreaming "add[s] additional hazards" to traffic stops by "allow[ing] anyone watching" — an unknown but potentially large number of people — "to know where an officer is and what he or she is doing in real time." In this manner, he contends, livestreaming via a platform like Facebook Live by someone inside a stopped vehicle has a unique capacity to "turn a routine traffic stop into a crowd-control operation, leaving the officer in an unsafe position." But what was not clearly known to Officer Helms was whether his efforts to prohibit livestreaming during a traffic stop for officer safety violated Sharpe's First Amendment rights. Indeed, no one has cited any case that addresses such conduct — whether in the Fourth Amendment context or, for that matter, in the First Amendment context. In the absence of such law, Officer Helms was entitled to qualified immunity, as the majority opinion holds, albeit following a different analysis.

The majority opinion applies a free-standing First Amendment analysis to the communication restriction, focusing on but a component of the seizure without addressing the seizure itself and its implication of the

Fourth Amendment. Thus, with its narrower focus, the opinion states that "livestreaming a police traffic stop is speech protected by the First Amendment," such that the burden shifts to the police officer to show that he had "weighty enough interests at stake," the prohibition "furthers those interests," and the prohibition is "sufficiently tailored to furthering those interests." *Ante* at 8-9. That is a traditional, freestanding First Amendment analysis that fails to account for the fact that the communication restriction was but a component of a seizure. If the opinion were to recognize the Fourth Amendment context based on the overall activity involved, it would have articulated a Fourth Amendment analysis that would determine — somewhat different from the narrower First Amendment analysis — whether the restriction on livestreaming was "reasonable." *Wilson*, 519 U.S. at 411 ("[T]he touchstone of [the] analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (quoting *Mimms*, 434 U.S. at 108-09)). And this approach would be the traditional one taken. When, during a lawful seizure, an officer demands identification, or orders a passenger to get out of the vehicle and remain at a distance from the driver, or orders an occupant to hand over a firearm temporarily during the stop — arguably implicating the First and Second Amendments, respectively — courts traditionally conduct a Fourth Amendment analysis to determine whether the restrictions on otherwise protected conduct are reasonable.

While the majority opinion's free-standing First Amendment analysis might, but need not, ultimately lead to the same result, the Fourth Amendment analysis is grounded on a straightforward concept of reasonableness. *See* U.S. Const. amend. IV ("The right of the people to be secure in their persons . . . against *unreasonable* . . . seizures, shall not be violated" (emphasis added)). And therefore in this case, the question would ultimately be whether prohibiting livestreaming by persons seized during traffic stops was reasonable, regardless of whether the restriction was imposed by individual officers or by town policy.

In any event, Sharpe has not identified any caselaw that clearly establishes that such a communication restriction was unreasonable. Moreover, the question of whether such a restriction was Town of Winterville policy remains an open question. I therefore concur in the judgment.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, EASTERN DIVISION, FILED JULY 9, 2021

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, EASTERN DIVISION
No. 4:19-CV-157-D

DIJON SHARPE,

Plaintiff,

v.

OFFICER WILLIAM BLAKE ELLIS, IN HIS OFFICIAL CAPACITY, AND OFFICER MYLES PARKER HELMS IV, IN HIS OFFICIAL CAPACITY,

Defendants.

July 9, 2021, Decided
July 9, 2021, Filed

ORDER

On October 9, 2018, Dijon Sharpe ("Sharpe" or "plaintiff') was a passenger in a car that Town of Winterville police officers William Blake Ellis ("Ellis" or "defendant") and Myers Parker Helms IV ("Helms" or "defendant") properly stopped for a traffic violation. As the police officers approached the car, Sharpe began

recording and livestreaming the traffic stop from inside the car. Officer Helms told Sharpe that he could record the traffic stop from inside the car during the traffic stop but not livestream the traffic stop from inside the car during the traffic stop. Sharpe now seeks damages from the officers and the Town of Winterville and contends that the officers and the Town of Winterville violated 42 U.S.C. § 1983 and the First Amendment by only allowing Sharpe to record the traffic stop from inside the car during the traffic stop.

As explained below, assuming without deciding that the First Amendment entitled Sharpe to record the traffic stop from inside the car during the traffic stop, the First Amendment did not entitle Sharpe to livestream the traffic stop from inside the car during the traffic stop. Thus, defendants did not violate the First Amendment, and the court grants defendants' motion for judgment on the pleadings. The court also denies as moot Sharpe's motion for entry of judgment.

I.

Sharpe resides in Pitt County, North Carolina. *See* Compl. [D.E. 1] ¶ 7. On October 9, 2018, Helms and Ellis, as officers of Winterville Police Department ("WPD"), properly stopped a car for a traffic violation. Sharpe was riding in the front passenger seat of the car. *See id.* ¶¶ 19-20. While still in the car and during the traffic stop, Sharpe "turned on the video recording function of his smartphone and began livestreaming—broadcasting in real-time—via Facebook Live to his Facebook account."

Id. ¶ 22. During the traffic stop, Helms approached the car and asked Sharpe his name, which Sharpe declined to provide. *See id.* ¶ 24. Helms and Ellis then returned to their patrol car. *See id.* ¶ 25. When Helms returned to Sharpe's car, he asked Sharpe, "What have we got? Facebook Live, cous?" M. ¶ 27 (alteration omitted); see Pl.'s Ex. A [D.E. 1-2] 17. Sharpe responded: "Yeah." Pl.'s Ex. A [D.E. 1-2] 17; *see* Compl. ¶ 28. Helms reached into the car through the open window and attempted to grab Sharpe's phone, pulling on his seatbelt and shirt in the process. *See* Compl. ¶ 28. Helms stated, "We ain't gonna do Facebook Live, because that's an officer safety issue." Pl.'s Ex. A [D.E. 1-2] 17. Later, Ellis remarked: "Facebook Live . . . we're not gonna have, okay, because that lets everybody y'all follow on Facebook [know] that we're out here. There might be just one me next time [sic] . . . It lets everybody know where y'all are at. We're not gonna have that." *Id.* at 19-20.[1] Ellis continued: "If you were recording, that is just fine . . . . We record, too. So in the future, if you're on Facebook Live, your phone is gonna be taken from you[] . . . [a]nd if you don't want to give up your phone, you'll go to jail." *Id.* at 20. Towards the end of the stop, Ellis stated, "But to let you know, you can record on your phone . . . but Facebook Live is not gonna happen." *Id.* at 21.

1. Ellis was correct. See Compl. ¶ 23; https://www.facebook.com/d.r.sharpe/videos/2251012878304654/ (last visited Aug. 14, 2020)0 (listing "Realtime Comments" including, *inter alia*, "Keep your live on," "It keep pausing," "Where ya'll at," "What kind of bull is going on now," "Did he just grab your phone!???," and "Handle it once it's off"). Sharpe has since deleted the video.

Appendix B

In his complaint, Sharpe makes two claims. First, Sharpe alleges a violation of 42 U.S.C. § 1983 and the First Amendment against Helms and Ellis, in their official capacities, and WPD. *See* Compl. ¶¶ 37-43. As for Helms and Ellis, Sharpe contends that they "physically attacked" him and "threatened to deprive" him of his First Amendment right to record and real-time broadcast his interactions with law enforcement. *Id.* ¶ 40. As for WPD, Sharpe cites *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and alleges "an unconstitutional policy, custom, or practice of preventing citizens from recording and livestreaming their interactions with police officers in the public performance of their duties." *Id.* ¶ 41. Second, Sharpe alleges a violation of section 1983 and the First Amendment against Helms in his individual capacity. See id. 11144-48. Specifically, Sharpe asserts that "[t]he physical attack by Officer Helms on Mr. Sharpe" violated the First Amendment. *Id.* ¶ 47; *see* [D.E. 19] 6-8.

On February 3, 2020, the defendants moved to dismiss the claims against WPD and against Helms in his individual capacity. *See* [D.E. 15]. On August 20, 2020, after briefing and oral argument, the court dismissed with prejudice Sharpe's claims against WPD and Helms in his individual capacity, holding that WPD is not an entity that may be sued under North Carolina law and that qualified immunity barred Sharpe's claim against Helms. *See* [D.E. 33] 4-6, 12-13.

Sharpe's remaining claims are against Helms and Myers in their official capacities (which really means the

claims are against the Town of Winterville). Sharpe seeks nominal damages, reasonable attorney's fees, costs, and a declaratory judgment concerning whether during the traffic stop and from inside the stopped car Sharpe "has the right, protected by the First Amendment . to both (a) record police officers in the public performance of their duties and (b) broadcast such recording in real-time." Compl. at 8. Defendants seek judgment on the pleadings on Sharpe's remaining claims. *See* [D.E. 36].

II.

A.

A party may move for judgment on the pleadings at any time "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c). A court should grant the motion if "the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law." *Park Univ. Enters., Inc. v. Am. Cas. Co. of Reading*, 442 F.3d 1239, 1244 (10th Cir. 2006) (quotation omitted), *abrogated on other grounds* by *Magnus, Inc. v. Diamond State Ins. Co.*, 545 F. App'x 750 (10th Cir. 2013) (unpublished); *see Mayfield v. NASCAR*, 674 F.3d 369, 375 (4th Cir. 2012); *Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir. 2002). A court may consider the pleadings and any materials referenced in or attached to the pleadings, which are incorporated by reference. *See* Fed. R. Civ. P. 10(c); *Fayetteville Invs. v. Com. Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991). A court also may consider "matters of which a court may

take judicial notice." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007).

The same standard applies under Rule 12(c) and Rule 12(b)(6). *See Mayfield*, 674 F.3d at 375; *Burbach Broad. Co.*, 278 F.3d at 405-06. Thus, a motion under Rule 12(c) tests the legal and factual sufficiency of the claim. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 677-80, 684, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-63, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010), *aff'd*, 566 U.S. 30, 132 S. Ct. 1327, 182 L. Ed. 2d 296 (2012); *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). To withstand a Rule 12(c) motion, a pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quotation omitted); *see Twombly*, 550 U.S. at 570; *Giarratano*, 521 F.3d at 302. In considering the motion, the court must construe the facts and reasonable inferences in the "light most favorable to the [nonmoving party]." *Massey v. Ojaniit*, 759 F.3d 343, 347, 352-53 (4th Cir. 2014) (quotation omitted); *see Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557 (4th Cir. 2013), *abrogated on other grounds v. Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); *Burbach Broad. Co.*, 278 F.3d at 406. A court need not accept as true a complaint's legal conclusions, "unwarranted inferences, unreasonable conclusions, or arguments." *Giarratano*, 521 F.3 d at 302 (quotation omitted); *see Iqbal*, 556 U.S. at 678-79. Rather, a plaintiff's allegations must "nudge[] [his] claims," *Twombly*, 550 U.S. at 570, beyond the realm

of "mere possibility" into "plausibility." *Iqbal*, 556 U.S. at 678-79.

B.

Sharpe's remaining claims are section 1983 claims against Helms and Myers in their official capacities. To prevail on a section 1983 claim, a plaintiff must show that he was "deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999); *see Thomas v. Salvation Army S. Territory*, 841 F.3d 632, 637 (4th Cir. 2016); *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003).

Sharpe's claims against Helms and Myers in their official capacities are really claims against the Town of Winterville. *See Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985); *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 469 (4th Cir. 2013); *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 307 n.13 (4th Cir. 2006); *Love-Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004). Accordingly, Sharpe must plausibly allege that a "policy or custom" attributable to the Town of Winterville caused the violation of his federally protected rights. *See Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997); *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991); *Graham*, 473 U.S. at 166; *Monell*, 436 U.S. at 690-94; *King v. Rubenstein*, 825 F.3d 206, 223 (4th Cir. 2016); *Santos*, 725 F.3d at 469-70.

Appendix B

The court assumes without deciding that Sharpe has plausibly alleged a policy or custom attributable to the Town of Winterville under *Monell* that prohibited a person during a traffic stop and from inside the stopped car to livestream the traffic stop. *Cf. Lytle*, 326 F.3d at 471 (detailing the four ways in which liability for a policy or custom may arise). Sharpe, however, still must demonstrate that the alleged policy deprived Sharpe of a right secured by the Constitution or laws of the United States on October 9, 2018. *See, e.g., Sullivan*, 526 U.S. at 49-50.

Sharpe claims that the Town of Winterville's alleged policy or custom deprived him of his First Amendment right on October 9, 2018. According to Sharpe, during the traffic stop and from inside the stopped car, he possessed a First Amendment right to "record police in the public performance of their duties and to broadcast such recordings in real-time." Compl. ¶ 35 (emphasis added); cf. Pl's Ex. A [D.E. 1-2] 20-21 (recounting that Helms and Meyers told Sharpe he could record, but was not allowed to livestream).

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. The First Amendment's protections extend beyond the text's proscriptions on laws abridging freedom of speech or of the press and encompass "a range of conduct related to the gathering and dissemination of information." *Glik v. Cunniffe* 655 F.3d 78, 82 (1st Cir. 2011); *see First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978);

Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688-89 (5th Cir. 2017). The First Amendment generally "prohibit[s] the government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank*, 435 U.S. at 783; see Turner, 848 F.3d at 688. The First Amendment protects a right to gather information "from any source by means within the law." *Houchins v. KQED, Inc.*, 438 U.S. 1, 11, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978) (quotation omitted); see *Glik*, 655 F.3d at 82 Gathering information about government officials in a form that can be readily disseminated "serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs." *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (quotation omitted); *see Mills v. Alabama*, 384 U.S. 214, 218-19, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966); *cf. Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013). "Protecting that right of information gathering not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally." *Gericke*, 753 F.3d at 7; *see Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 831 (1st Cir. 2020), *petition for cert. filed*, (U.S. May 17, 2020) (No. 20-1598).

Several federal circuit courts have held that the First Amendment generally protects the right to record the police in performing their public duties. *See Fields v. City of Phila.*, 862 F.3d 353, 355-56, 358-60 (3d Cir. 2017) (taking pictures with a camera and iPhone camera); *Turner*, 848 F.3d at 683-84, 690 (videotaping); *Gericke*, 753 F.3d at 3-4, 7-9 ("audio-video record[ing]" with a

camera); *ACLU v. Alvarez*, 679 F.3d 583, 595-97 (7th Cir. 2012) ("[a]udio recording"); *Glik*, 655 F.3d at 79-80, 82-83 (video recording on cell phone); *Smith v. City of Cumming* 212 F.3d 1332, 1332-33 (11th Cir. 2000) (videotaping); *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995) (same). This court agrees with that general principle and assumes without deciding that on October 9, 2018, the First Amendment entitled Sharpe to record the traffic stop from inside the car during the traffic stop. However, the United States Court of Appeals for the Fourth Circuit has not yet addressed whether the First Amendment protects the right to record the police in performing their public duties, let alone whether the First Amendment protects the right of a person from inside a stopped car to livestream the police performing a traffic stop. *See Szymecki v Houck*, 353 F. App'x 852, 852 (4th Cir. 2009) (per curiam) (unpublished); *Hulbert v. Pope*, No. SAG-18-00461, 2021 U.S. Dist. LEXIS 77897, 2021 WL 1599219, at *8 (D. Md. Apr. 22, 2021) (unpublished), *appeal docketed*, No. 21-1608 (4th Cir. May 24, 2021).

Sharpe contends that the cases from other federal circuit courts holding that the First Amendment includes a right to record the police performing their public duties established his right to livestream the traffic stop from inside the stopped car on October 9, 2018. *See* Compl. ¶¶ 35-36; [D.E. 39] 6-10. These cases, however, do not address, much less resolve Sharpe's claim. Recording a traffic stop for publication after the traffic stop versus livestreaming an ongoing traffic stop from inside the stopped car during the traffic stop are significantly different. *See* [D.E. 33] 9-11 (describing the significant differences between recording

and livestreaming) Indeed, during the traffic stop, Ellis made precisely this distinction. Ellis told Sharpe he could record the traffic stop from inside the stopped car during the traffic stop, but that he could not livestream it. *See* Pl.'s Ex. A [D.E. 1-2] 19-20. Notably, recording a public interaction with the police preserves that interaction for the recorder's later use. In contrast, livestreaming the interaction from inside the stopped car during the traffic stop contemporaneously broadcasts the interaction to another recipient. Moreover, broadcasting the interaction from inside the stopped car during the traffic stop in real-time with contemporaneous geolocation information conveys both the interaction and the location where it is occurring. Furthermore, contemporaneous messaging allows the individual livestreaming, and those watching, to know the location of the interaction, to comment on and discuss in real-time the interaction, and to provide the perspective from inside the stopped car. The perspective from inside the stopped car, for example, would allow a viewer to see weapons from inside the stopped car that an officer might not be able to see and thereby embolden a coordinated attack on the police. Although Sharpe cites cases recognizing a First Amendment right to record the police performing their public duties, Sharpe cites no authority to support his contention that on October 9, 2018, the First Amendment provided a right to livestream a traffic stop from inside the stopped car during the traffic stop. *Cf.* [D.E. 39] 6-7.

As mentioned, the Fourth Circuit has not yet recognized a First Amendment right to record police performing their public duties, much less to livestream

a traffic stop from inside the stopped car during the traffic stop. *Cf. Szymecki*, 353 F. App'x at 852. Tellingly, even the federal circuit courts that have recognized a right to record the police performing their public duties have explicitly declined to address "the limits of this constitutional right " *Fields*, 862 F.3d at 360; *see Turner*, 848 F.3d at 690; *Gericke*, 753 F.3d at 7-9. For example, the Third Circuit opined that an activity "interfer[ing] with police activity" such that the recording "put[s] a life at stake" might not be protected. *Fields*, 862 F.3d at 360. Likewise, the United States District Court for the District of Maryland recognized the First Amendment right to record police performing their public duties, but held that such recording is subject to time, place, and manner restrictions. *See Hulbert*, 2021 U.S. Dist. LEXIS 77897, 2021 WL 1599219, at *8. In light of existing precedent and the differences between recording and livestreaming from inside the stopped car during the traffic stop, the court rejects Sharpe's argument that the First Amendment provided him a right to livestream a traffic stop from inside the stopped car on October 9, 2018. Accordingly, the court holds that Sharpe has failed to allege a deprivation of a right secured by the Constitution or laws of the United States on October 9, 2018. Thus, the court grants defendants' motion for judgment on the pleadings

Alternatively, Sharpe's claim fails because the alleged policy survives intermediate scrutiny. The validity of Sharpe's section 1983 claim hinges on his allegations that the Town of Winterville has an unconstitutional policy that prohibited Sharpe from livestreaming his encounter with the police officer during the traffic stop from inside

the stopped car on October 9, 2018. See Compl. ¶ 41. As alleged, this policy restricted protected speech in public fora, and the court applies the "time, place, and manner doctrine" to determine whether the policy violates the First Amendment. *Ross v. Early*, 746 F.3d 546, 552 (4th Cir. 2014); *see Fields*, 862 F.3d at 360; *Turner*, 848 F.3d at 690; *Gericke*, 753 F.3d at 7-9; *Alvarez*, 679 F.3d at 605; *Glik*, 655 F.3d at 84; *Smith*, 212 F.3d at 1333. The policy is content-neutral because it is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (quotation omitted); *see Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984). Accordingly, the court analyzes whether the policy is "narrowly tailored to serve a significant governmental interest, and leave[s] open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (1989) (quotation omitted); see Clark, 468 U.S. at 293; Ross, 746 F.3d at 552. A policy is narrowly tailored if it "promotes a substantial government interest" and "does not burden substantially more speech than is necessary to further the government's legitimate interests." Ross, 746 F.3d at 552-53; see *Ward*, 491 U.S. at 791, 799; *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985).

The court first determines whether the alleged policy promotes "a substantial government interest." Here, the alleged purpose of the policy is officer and public safety. *See* Pl.'s Ex. A [D.E. 1-2] 17, 19-20 (Helms arid Meyers told Sharpe that he could not livestream from inside the car during the traffic stop because livestreaming threatens

officer and public safety)[2] The public has a "paramount interest in officer safety" and public safety. *United States*

2. "[W]hen it is obvious that a challenged law serves a significant governmental interest, . . . the government [is not required] to produce evidence" demonstrating that the law serves a substantial government interest. *Billups v. City of Charleston*, 961 F.3d 673, 685 (4th Cir. 2020). Rather, the government may demonstrate a significant interest "by reference to case law." *Reynolds v. Middleton*, 779 F.3d 222, 228 & n.4 (4th Cir. 2015). Here, the pleadings and case law demonstrate that the Town of Winterville's policy serves its substantial interest in officer and public safety. A review of Sharpe's video indicates that Sharpe's livestreaming from inside the stopped car permitted live broadcast from inside the car of the officers' movements, the perspective from within the stopped car, real-time comments from viewers, and geolocation data. *See* https://www.facebook.com/d.r.sharpe/videos/2251012878304654/ (last visited Aug. 14, 2020). These features undermine an officer's ability to exercise "command of the" traffic stop, thereby increasing the risks to officers and the public. *Arizona v. Johnson*, 555 U.S. 323, 330, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009); *see Maryland v. Wilson*, 519 U.S. 408, 414, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997); *Michigan v. Summers*, 452 U.S. 692, 702-03, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981); see also *United States v. Fager*, 811 F.3d 381, 388-89 (10th Cir. 2016) (describing the increased threat of "coordinated attack[s]" on officers in the context of traffic stops); Bureau of Justice Assistance, Developing a Policy on the Use of Social Media in Intelligence and Investigative Activities: Guidance and Recommendations 1 (2013), https://bja.ojp.gov/ sites/g/files/xyckuhl 86/files/media/ document/developing_a_policy_on the use of social media in inteffigence_and inves.pdf (last visited July 9, 2021) ("Social media sites are increasingly being used to instigate or conduct criminal activity[.]"). Accordingly, the alleged policy serves the substantial government interest of protecting officer and public safety because the policy eliminates a form of individual conduct from inside the stopped car that increases risks to officer and public safety. *See Ross*, 746 F.3d at 555-56.

v. Stanfield, 109 F.3d 976, 979-80 (4th Cir. 1997); *see Wilson*, 519 U.S. at 412 (stating that the public interest in officer safety is "both legitimate and weighty" (quotation omitted)); *Mahoney v. Sessions*, 871 F.3d 873, 882 (9th Cir. 2017) Indeed, this substantial interest in officer and public safety is more pronounced during traffic stops where the Supreme Court repeatedly has recognized that police officers face unique dangers and that those dangers carry over to the public. *See Rodriguez v. United States*, 575 U.S. 348, 356-57, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015); *Johnson*, 555 U.S. at 330-32; *Wilson*, 519 U.S. at 413-14; *Michigan v. Long*, 463 U.S. 1032, 1047-48, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

Next, the court determines whether the policy "burdens substantially more speech than is necessary to further the government's legitimate interests." *Ross*, 746 F.3d at 557 (alteration and quotation omitted). To satisfy this standard, the alleged policy need not be "the least restrictive or least intrusive means." *Ward*, 491 U.S. at 798; *see Turner*, 848 F.3d at 690; *Reynolds*, 779 F.3d at 226. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative " *Ward*, 491 U.S. at 800; *see Am. Entertainers, L.L.C. v. City of Rocky Mount*, 888 F.3d 707, 717 (4th Cir. 2018); *Ross*, 746 F.3d at 557. Moreover, a policy is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689.

Appendix B

Viewing the pleadings in the light most favorable to Sharpe, the alleged policy prohibited livestreaming a police encounter from inside the stopped car during the traffic stop. As such, the policy is limited in scope and duration in that it only prohibited livestreaming from inside the stopped car during the traffic stop. Notably, the policy does not ban *recording* police officers from inside the stopped car during the traffic stop. See Pl.'s Ex. A [D.E. 1-2] 20-21 ("If you were recording, that is just fine . . . . We record, too."). The policy also does not prohibit a person who is not the subject of the traffic stop and who is not inside the stopped car from recording and livestreaming the traffic stop. Accordingly, "[o]n its face, the [p]olicy does no more than target and eliminate the exact source of the evil it seeks to remedy." *Ross*, 746 F.3d at 557 (alterations and quotations omitted); *see Frisby v. Schultz*, 487 U.S. 474, 485, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988). Given the substantial officer and public safety interest, the policy achieves the government's substantial interest by increasing officers' command of those inside the stopped car during the traffic stop by removing features such as live video, real-time commenting, and geolocation data, from being used from inside the stopped car to coordinate an attack on the officers and the public. "[T]herefore, it is apparent that the [policy] directly furthers the [Town's] legitimate governmental interests and that those interests would have been less well served in the absence of the [policy preventing livestreaming]." Ward, 491 U.S. at 801; see *Albertini*, 472 U.S. at 688-89.[3] Accordingly, the

3. Sharpe does not argue that there are less intrusive ways for the Town to achieve its officer and public safety interests. Cf. [D.E. 39] 6-10. Moreover, in light of the concerns associated with

alleged policy is not "substantially broader than necessary to achieve the government's interest." *Am. Entertainers*, 88 F.3d at 717 (quotation omitted). Thus, the court holds that the Town of Winterville's alleged policy is narrowly tailored to serve a substantial government interest.

Finally, the court analyzes whether the policy leaves open "ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791; see *Ross*, 746 F.3d at 559. To satisfy this standard, the available alternatives need not "be the speaker's first or best choice or provide the same audience or impact for the speech." Ross, 746 F.3d at 559 (alteration and quotation omitted); *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000). Instead, the relevant inquiry focuses on whether the challenged policy "provides avenues for the more general dissemination of a message." Ross, 746 F.3d at 559 (quotation omitted); see *Green v. City of Raleigh*, 523 F.3d 293, 305 (4th Cir. 2008).

The alleged policy allows Sharpe to record the police encounters from inside the stopped car for later use, such as posting to Facebook a video recorded from inside

---

livestreaming from inside the stopped car during the traffic stop, there appear to be no less intrusive ways of achieving the public interest in officer and public safety short of barring the use of livestreaming from inside the stopped car during the traffic stop. Accordingly, the court concludes that defendants are not required to present proof that the Town tried other methods to address its officer and public safety concerns in order to demonstrate narrow tailoring. *Cf. McCullen v. Coakley*, 573 U.S. 464, 494-97, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014) (requiring the government to present proof that it tried less intrusive methods where less intrusive means were actually available); *Reynolds*, 779 F.3d at 231-32 (same).

the stopped car during the traffic stop or submitting the video to media outlets for broadcast. *See* Pl.'s Ex. A. [D.E. 1-2] 20-21 ("If you were recording, that is just fine. . . We record, too."). As such, the policy does not "hinder [Sharpe's] ability to disseminate [his] message." Ross, 746 F.3d at 559. The policy also does not prohibit any person not inside the stopped car from recording and livestreaming the traffic stop. Thus, the policy leaves open ample alternatives of communication. Accordingly, the court holds that the alleged policy survives intermediate scrutiny and that the defendants are entitled to judgment as a matter of law.

C.

Sharpe also moves for entry of final judgment concerning this court's August 20, 2020 order dismissing Sharpe's section 1983 claim against Helms in his individual capacity. See [D.E. 34]; Fed. R. Civ. P. 54(b). In cases involving multiple claims or multiple parties, a "court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). All claims between the parties have been resolved, and the court's judgment is now final. Thus, the court dismisses as moot Sharpe's Rule 54(b) motion.

III.

In sum, the court GRANTS defendants' motion for judgment on the pleadings [D.E. 36] and DISMISSES AS MOOT plaintiff's motion for entry of final judgment [D.E. 34]. The clerk shall close the case.

SO ORDERED. This 9 day of July 2021.

/s/ James C. Dever III
JAMES C. DEVER III
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, EASTERN DIVISION, FILED AUGUST 20, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA, EASTERN DIVISION

No. 4:19-CV-157-D

DIJON SHARPE,

Plaintiff,

v.

WINTERVILLE POLICE DEPARTMENT, OFFICER WILLIAM BLAKE ELLIS, IN HIS OFFICIAL CAPACITY, AND OFFICER MYLES PARKER HELMS IV, BOTH INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,

Defendants.

August 20, 2020, Decided;
August 20, 2020, Filed

ORDER

On November 3, 2019, Dijon Sharpe ("plaintiff' or "Sharpe") filed a complaint against the Winterville Police Department ("WPD"), Officer William Blake Ellis ("Ellis") in his official capacity only, and Officer Myers Parker

Helms IV ("Helms") in both his individual and official capacities (collectively, "defendants"), alleging violations of 42 U.S.C. § 1983 and the First Amendment that arise from Sharpe recording and real-time broadcasting a traffic stop involving Sharpe (who was a passenger in the car), Helms, and Ellis. *See* Compl. [D.E. 1]. On February 3, 2020, the defendants filed a partial motion to dismiss and supporting memorandum, seeking dismissal of the claims against WPD and Helms in his individual capacity. *See* [D.E. 15, 16]. On February 24, 2020, Sharpe responded in opposition. *See* [D.E. 19]. On March 9, 2020, the defendants replied. *See* [D.E. 20]. On August 14, 2020, the court heard argument on the motion. As explained below, the court grants the defendants' partial motion to dismiss.

I.

Sharpe resides in Pitt County, North Carolina. *See* Compl. ¶ 7. On October 9, 2018, Helms and Ellis, as officers of WPD, properly stopped a car in which Sharpe was riding in the front-passenger seat. *See id.* at ¶¶ 19-20. Sharpe then "turned on the video recording function of his smartphone and began livestreaming — broadcasting in real-time — via Facebook Live to his Facebook account." *Id.* at ¶ 22. During the traffic stop, Helms approached the car and asked Sharpe his name, which he declined to provide. *See id.* at ¶ 24. Helms and Ellis then returned to their patrol car. *See id.* at ¶ 25. When Helms returned to Sharpe's car, he asked Sharpe, "What have we got? Facebook Live, cous?" *Id.* at ¶ 27 (alteration omitted); *see* Pl.'s Ex. A [D.E. 1-2] 17. Sharpe responded: "Yeah." Compl. at ¶ 28; *see* Pl.'s Ex. A at 17. Helms reached in

and attempted to grab Sharpe's phone, pulling on his seatbelt and shirt in the process. *See* Compl. at ¶ 28. Helms stated, "We ain't gonna do Facebook Live, because that's an officer safety issue." Pl.'s Ex. A at 17. Later, Ellis remarked: "Facebook Live . . . we're not gonna have, okay, because that lets everybody y'all follow on Facebook that we're out here. There might be just one me next time [sic] . . . It lets everybody know where y'all are at. We're not gonna have that." *Id.* at 19-20.[1] Ellis continued: "If you were recording, that is just fine. . . . We record, too. So in the future, if you're on Facebook Live, your phone is gonna be taken from you . . . [a]nd if you don't want to give up your phone, you'll go to jail." *Id.* at 20. Towards the end of the stop, Ellis stated, "But to let you know, you can record on your phone . . . but Facebook Live is not gonna happen." *Id.* at 21.

Sharpe makes two claims. First, Sharpe alleges a violation of 42 U.S.C. § 1983 and the First Amendment against Helms and Ellis, in their official capacities, and WPD. *See* Compl. at ¶¶ 37-43. As for Helms and Ellis, Sharpe states that they "physically attacked" him and "threatened to deprive" him of his First Amendment right to record and real-time broadcast his interactions with law enforcement. *Id.* at ¶ 40. As for WPD, Sharpe cites *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and alleges "an unconstitutional policy,

1. Ellis was correct. *See* Compl. at ¶ 23; https://www.facebook.com/d.r.sharpe/videos/2251012878304654/ (last visited Aug. 14, 2020) (listing "Realtime Comments" including, *inter alia*, "Keep your live on", "It keep pausing", "Where ya'll at", "What kind of bull is going on now", "Did he just grab your phone!???", and "Handle it once it's off').

custom, or practice of preventing citizens from recording and livestreaming their interactions with police officers in the public performance of their duties." *Id.* at ¶ 41. Second, Sharpe alleges a violation of 42 U.S.C. § 1983 and the First Amendment against Helms in his individual capacity. *See id.* at ¶¶ 44-48. Specifically, Sharpe asserts that "[t]he physical attack by Officer Helms on Mr. Sharpe" violated his First Amendment rights. *Id.* at ¶ 47; *see* [D.E. 19] 6-7.[2] Sharpe seeks nominal damages, reasonable attorney's fees, costs, and a declaratory judgment concerning whether Sharpe "has the right, protected by the First Amendment . . . to both (a) record police officers in the public performance of their duties and (b) broadcast such recording in real-time." Compl. at 8.

II.

A motion to dismiss under Rule 12(b)(6) tests the complaint's legal and factual sufficiency. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-80, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-63, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010), *aff'd*, 566 U.S. 30, 132 S. Ct. 1327, 182 L. Ed. 2d 296 (2012); *Nemet Chevrolet. Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009); *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). To withstand a Rule 12(b)(6) motion, a pleading "must contain sufficient factual matter,

2. In responding to defendants' motion to dismiss and at oral argument, Sharpe disclaimed reliance on the Fourth Amendment and stated that the complaint involves only "an issue of First-Amendment protected conduct." [D.E. 19] 6.

accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quotation omitted); *see Twombly*, 550 U.S. at 570; *Giarratano*, 521 F.3d at 302. In considering the motion, the court must construe the facts and reasonable inferences "in the light most favorable to the [nonmoving party]." *Massey v. Ojaniit*, 759 F.3d 343, 352 (4th Cir. 2014) (quotation omitted); *see Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557 (4th Cir. 2013), *abrogated on other grounds Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). A court need not accept as true a complaint's legal conclusions, "unwarranted inferences, unreasonable conclusions, or arguments." *Giarratano*. 521 F.3d at 302 (quotation omitted); *see Iqbal*, 556 U.S. at 678-79. Rather, a plaintiff's allegations must "nudge[ ] [his] claims," *Twombly*, 550 U.S. at 570, beyond the realm of "mere possibility" into "plausibility." *Iqbal*, 556 U.S. at 678-79.

When evaluating a motion to dismiss, a court considers the pleadings and any materials "attached or incorporated into the complaint." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011); *see* Fed. R. Civ. P. 10(c); *Thompson v. Greene*, 427 F.3d 263, 268 (4th Cir. 2005). A court also may consider a document submitted by a moving party if it is "integral to the complaint and there is no dispute about the document's authenticity" without converting the motion into one for summary judgment. *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165-66 (4th Cir. 2016). Additionally, a court may take judicial notice of public records when evaluating a motion to dismiss for failure to state a claim. *See, e.g.*, Fed. R. Evid. 201; *Tellabs. Inc. v. Makor Issues & Rights,*

Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007); *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

III.

A.

Defendants move to dismiss WPD as a defendant under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* [D.E. 15] 1; [D.E. 20] 1-3. Defendants contend that Sharpe has failed to state a claim for which relief can be granted because WPD is not an entity that can be sued under North Carolina law. *See* [D.E. 20] 1-3. Sharpe responds that "[t]he inclusion of [WPD] as a separate named Defendant was a prophylactic measure . . . in the event the official capacity claims were somehow procedurally defective." [D.E. 19] 2. Thus, Sharpe "defers to the Court's judgment regarding the motion to dismiss [WPD] as a discrete entity." *Id.* At oral argument, Sharpe conceded that WPD was not a proper entity to sue.

State law determines the capacity of a state governmental body to be sued in federal court. *See Avery v. Burke Cty.*, 660 F.2d 111, 113-14 (4th Cir. 1981). Accordingly, this court must predict how the Supreme Court of North Carolina would rule on such a state law issue. *See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C.*, 433 F.3d 365, 369 (4th Cir. 2005). In doing so, the court must look first to opinions of the Supreme Court of North Carolina. *See id.; Parkway 1046, LLC v. U.S. Home Corp.*, 961 F.3d 301, 306 (4th

Cir. 2020); *Stahle v. CTS Corp.*, 817 F.3d 96, 100 (4th Cir. 2016). If there are no governing opinions from that court, this court may consider the opinions of the North Carolina Court of Appeals, treatises, and "the practices of other states." *Twin City Fire Ins. Co.*, 433 F.3d at 369 (quotation omitted)[3] In predicting how the highest court of a state would address an issue, this court must "follow the decision of an intermediate state appellate court unless there [are] persuasive data that the highest court would decide differently." *Toloczko*, 728 F.3d at 398 (quotation omitted); *see Hicks v. Feiock*, 485 U.S. 624, 630, 108 S. Ct. 1423, 99 L. Ed. 2d 721 & n.3 (1988). Moreover, in predicting how the highest court of a state would address an issue, this court "should not create or expand a [s]tate's public policy." *Time Warner Entertainment-Advance/Newhouse P'ship v. Carteret-Craven Elec. Mbrshp. Corp.*, 506 F.3d 304, 314 (4th Cir. 2007) (alteration and quotation omitted); *see Day & Zimmermann, Inc. v Challoner*, 423 U.S. 3, 4, 96 S. Ct. 167, 46 L. Ed. 2d 3 (1975) (per curiam); *Wade v. Danek Med.. Inc.*, 182 F.3d 281, 286 (4th Cir. 1999).

"The capacity of a governmental body to be sued in the federal courts is governed by the law of the state in which the district court is held." *Avery*, 660 F.2d at 113-14; *see* Fed. R. Civ. P. 17(b). A North Carolina county is a legal entity which may be sued under certain circumstances. *See* N.C. Gen. Stat. § 153A-11. Likewise, a North Carolina city or town is a legal entity which may be sued under certain circumstances. *See* N.C. Gen. Stat. § 160A-485; *see also*

3. North Carolina does not have a mechanism to certify questions of state law to its Supreme Court. *See Town of Nags Head v. Toloczko*, 728 F.3d 391, 397-98 (4th Cir. 2013).

id. § 160A-1(2) (noting that "'[c]ity' is interchangeable with the terms 'town' for purposes of section 160A). However, there is no corresponding statute authorizing suit against a North Carolina county police department or town police department. *See, e.g., Parker v. Bladen Cty.*, 583 F. Supp. 2d 736, 740 (E.D.N.C. 2008); *Moore v. City of Asheville*, 290 F. Supp. 2d 664, 673 (W.D.N.C. 2003), *aff'd*, 396 F.3d 385 (4th Cir. 2005); *Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), *overruled in part on other grounds by Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997). Accordingly, the court dismisses WPD as a defendant under Rule 12(b)(6).

B.

Defendants also move to dismiss the section 1983 claim against Helms in his individual capacity. *See* [D.E. 15] 2. In support, Helms asserts qualified immunity concerning the claim against him individually because Sharpe did not have a First Amendment right to record and real-time broadcast Helms and Ellis publicly performing their police duties on October 9, 2018. Alternatively, Helms asserts that such a right was not clearly established on October 9, 2018. *See* [D.E. 16] 4-11; [D.E. 20] 3-7. Sharpe disagrees. *See* [D.E. 19] 3-8.

Helms is entitled to qualified immunity under section 1983 unless "(1) [he] violated a federal statutory or constitutional right, and (2) the unlawfulness of [his] conduct was 'clearly established at the time.' *District of Columbia v. Wesby*, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453

(2018) (quotation omitted); *see Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020). "'Clearly established' means that, at the time of the [official's] conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *Wesby*, 138 S. Ct. at 589 (quotation omitted); *see e.g., City of Escondido v. Emmons*, 139 S. Ct 500, 503-04, 202 L. Ed. 2d 455 (2019) (per curiam). "A court may consider either prong of the qualified immunity analysis first." *Ray*, 948 F.3d at 226; *see Sims v. Labowitz*, 885 F.3d 254, 260 (4th Cir. 2018).

Although the Supreme Court "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018) (per curiam) (quotation and citation omitted); *see Wesby*, 138 S. Ct. at 590; *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). In the Fourth Circuit, "existing precedent" includes precedent of the United States Supreme Court, the Fourth Circuit, and the highest court of the state in which the action arose. *See Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 176 (4th Cir. 2010).[4] "In the absence of 'directly on-point, binding

4. The United States Supreme Court has held that its precedent qualifies as controlling for purposes of qualified immunity. *See Wesby*, 138 S. Ct. at 591-93 & n.8. The Supreme Court has reserved judgment on whether decisions of a federal court of appeals are a source of clearly established law for purposes of qualified immunity. *See id.; Kisela*, 138 S. Ct. at 1152-54; *Taylor v. Barkes*, 575 U.S. 822, 135 S.

authority,' courts may also consider whether 'the right was clearly established based on general constitutional principles or a consensus of persuasive authority.'" *Ray*, 948 F.3d at 229 (quoting *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 543 (4th Cir. 2017)).

As for the first prong of the qualified immunity analysis, Sharpe alleges that Helms retaliated against him in violation of the First Amendment by attempting to prevent the recording and real-time broadcasting of their encounter. *See* [D.E. 19] 6-8. "[A] First Amendment retaliation claim under § 1983 consists of three elements: (1) the plaintiff engaged in constitutionally protected First Amendment activity, (2) the defendant took an action that adversely affected that protected activity, and (3) there was a causal relationship between the plaintiff's protected activity and the defendant's conduct" *Booker*, 855 F.3d at 537; *see Raub v. Campbell*, 785 F.3d 876, 885 (4th Cir. 2015).

As for the first element, the court assumes without deciding that Sharpe engaged in constitutionally-protected free speech when he recorded and real-time broadcasted his encounter with Helms As for the second element, the court assumes without deciding that Helms "took an action that adversely affected" Sharpe's recording and real-time broadcasting activity. *Booker*, 855 F.3d at 537. Helms attempted to grab Sharpe's phone during the encounter. Sharpe pulled away and Helms grabbed Sharpe's seatbelt.

Ct. 2042,2044-45, 192 L. Ed. 2d 78 (2015) (per curiam); *City & Cty. of S.F. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765,1776, 191 L. Ed. 2d 856 (2015); *Carroll v. Carman*, 574 U.S. 13,16-17, 135 S. Ct. 348, 190 L. Ed. 2d 311 (2014) (per curiam).

See Pl.'s Ex. A at 17-21. This conduct did not interrupt Sharpe's recording and real-time broadcasting, and Sharpe recorded and broadcast the entire encounter. Nonetheless, such conduct "may tend to chill individuals' exercise of constitutional rights." *Am. Civ. Liberties Union of Md.. Inc. v. Wicomico Cty.*, 999 F.2d 780,785 (4th Cir. 1993); *see Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), *overruled on other grounds by Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). A police officer reaching into a vehicle to grab a phone that is real-time broadcasting "would likely deter a person of ordinary firmness from the exercise of First Amendment rights." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005) (quotation omitted) (collecting cases).

As for the third element, the court assumes without deciding that a clear causal relationship exists between Sharpe's recording and real-time broadcasting and Helms's conduct. "In order to establish this causal connection, a plaintiff in a retaliation case must show, at the very least, that the defendant was aware of [plaintiff's] protected activity." *Id.* at 501; *see Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998). A plaintiff must also show temporal proximity between defendant's awareness of the plaintiff's protected activity and the adverse action. *See Constantine*, 411 F.3d at 501. Here, Helms asked Sharpe: "What have we got? Facebook Live, cous?" Pl.'s Ex. A [D.E. 1-2] 17. Sharpe responded, "Yeah." [D.E. 1-2] 17. Immediately after this exchange, Helms attempted to grab Sharpe's phone. *See id.* Helms then stated, "We ain't gonna do Facebook Live,

because that's an officer safety issue." *Id.* The allegations demonstrate both knowledge and temporal proximity. Helms grabbed at Sharpe's phone only after learning that Sharpe was recording and real-time broadcasting. Accordingly, the court assumes without deciding that Sharpe has adequately pleaded a First Amendment retaliation claim.[5]

As for the "clearly established" prong of the qualified immunity analysis, Sharpe's right to record and real-time broadcast his encounter with police must have been clearly established on October 9, 2018. *See, e.g., Wesby*, 138 S. Ct. at 589; *Emmons* 139 S. Ct. at 503-04. It was not. There is no precedent from the Supreme Court, the Fourth Circuit, or the Supreme Court of North Carolina that clearly established this legal right on October 9, 2018. The closest Supreme Court or Fourth Circuit case is *Szymecki v. Houck*, 353 F. App'x 852 (4th Cir. 2009) (per curiam) (unpublished). In *Szymecki*, the Fourth Circuit affirmed a district court's conclusion "that [plaintiff's] asserted First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct." *Id.* at 853. Of course, "the absence of controlling authority holding identical conduct

5. This assumption does not affect the "clearly established" prong of the court's analysis. *See, e.g., Fields v. City of Phila.*, 862 F.3d 353, 360-62 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 685-90 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1, 7-10 (1st Cir. 2014); *ACLU v. Alvarez*, 679 F.3d 583, 594-603 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82-85 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1332-33 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439-40 (9th Cir. 1995).

unlawful does not guarantee qualified immunity." *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004). But the Supreme Court has repeatedly counseled that "'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) (quoting *al-Kidd*, 563 U.S. at 742); *see, e.g., Wesby*, 138 S. Ct at 590; *Plumhoff v. Rickard*, 572 U.S. 765, 779, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014); *Ray*, 948 F.3d at 229.

Sharpe's activity not only involves the right of a passenger in a stopped vehicle during a traffic stop to record police, but also to real-time broadcast such a recording during the traffic stop. *Cf. White*, 137 S. Ct at 552 ("As [the Supreme] Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case."). Indeed, Ellis made precisely this distinction—Sharpe recording versus recording and real-time broadcasting—during the traffic stop. *See* Pl.'s Ex. A at 19-20. Although other circuit courts have published opinions recognizing the right to record police in performing their public duties, no circuit court has addressed the right of a passenger in a stopped vehicle during a traffic stop to record *and* real-time broadcast police in performing their public duties.[6] On October 9, 2018, when Helms attempted to grab Sharpe's phone to prevent Sharpe from recording and real-time broadcasting during the traffic stop, it would not have been "clear to a reasonable officer that his conduct was unlawful [under the

6. This conclusion applies even under a generous reading of "consensus of persuasive authority" that includes sister circuits. *Ray*, 948 F.3d at 229 (quotation omitted).

First Amendment] in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *overruled on other grounds by Pearson*. 555 U.S. 223, 231-43, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Accordingly, Helms is entitled to qualified immunity.[7]

In opposition, Sharpe argues that anyone recording any traffic stop is the same as anyone real-time broadcasting any traffic stop. Sharpe then cites *Ray* and argues that "general constitutional principles or a consensus of persuasive authority" clearly established that First Amendment right on October 9, 2018. *See Ray*, 948 F.3d at 229.

The court rejects Sharpe's argument. As Sharpe admits, the Fourth Circuit has not held in a published opinion that an individual's right under the First Amendment to record a traffic stop is clearly established, much less held that an individual has a right to record and real-time broadcast a traffic stop from within the stopped car. *Cf. Szymecki*, 353 F. App'x at 852. Moreover, evolutions in technology help to defeat Sharpe's contention that recording a traffic stop from within the stopped car equals real-time broadcasting that traffic stop. It does not suffice for a court simply to determine whether an individual's behavior constitutes "recording" or not "recording" a traffic stop. After all, such "recording" may

7. The court recognizes the current state of qualified immunity doctrine, and the debate about whether the Supreme Court or Congress should change it. *See, e.g.*:, [D.E. 19] 8 & n.6; William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018). As a lower court, however, this court must follow binding precedent.

fall within five, distinct factual scenarios: (1) recording; (2) recording *and* real-time broadcasting; (3) recording *and* real-time broadcasting with geo-location information; (4) recording *and* real-time broadcasting with the ability to interact via messaging applications in real-time with those watching; and (5) recording *and* real-time broadcasting with geo-location information and the ability to interact via messaging applications in real-time with those watching. Recording an interaction preserves that interaction for the recorder's later use. In contrast, broadcasting the interaction contemporaneously conveys the interaction to another recipient. Broadcasting the interaction contemporaneously, with contemporaneous geo-location information, conveys both the interaction and the location at which it is occurring. And contemporaneous messaging applications allow the individual recording, and those watching, to know the location of the interaction and to comment on and discuss in real-time the interaction. The circuit courts to which Sharpe points in support of his argument address an onlooker recording a police encounter as contemplated in the first scenario.[8] Thus, even assuming those cases indicate a "consensus of persuasive authority" concerning the first scenario, they do not address the other four scenarios. Additionally, none of those cases involved a recording by a passenger in a stopped vehicle during a traffic stop.

---

8. *See Fields*, 862 F.3d at 356 (taking pictures with a camera and iPhone camera); *Turner*, 848 F.3d at 683-84 ("videotaping"); *Gericke*, 753 F.3d at 3-4 ("audio and video record[ing]" with a camera); *Alvarez*, 679 F.3d at 588 ("audio recording"); *Glik*, 655 F.3d at 79-80 (video recording on cell phone); *Smith*, 212 F.3d at 1332 ("videotaping"); *Fordyce*, 55 F.3d at 438 (videotaping).

Sharpe's conduct falls within either the fourth or fifth scenario. Even broadly applying *Ray*, a "consensus of persuasive authority" cannot form on an issue the courts did not address. Sharpe invites the court to sweep all five scenarios into a simple "recording" category, but the court declines the invitation. To do so would ignore clear distinctions among the five scenarios, as well as the distinction between an onlooker versus a passenger in a stopped vehicle during a traffic stop. To do so also would ignore binding Supreme Court precedent and analyze an individual's First Amendment right to record a traffic stop from within a stopped vehicle at too high a level of generality. *See, e.g., Wesby*, 138 S. Ct. at 590; *Pauly*, 137 S. Ct. at 552; *Plumhoff*, 572 U.S. at 779.

That this case involved Sharpe recording and real-time broadcasting with the ability to interact via messaging applications in real-time with those watching a traffic stop from inside the stopped vehicle also animates this court's conclusion that Helms is entitled to qualified immunity. Each circuit court to analyze an individual's First Amendment right to record a police encounter noted that the right to record a police encounter is not unbounded, and that the right "may be subject to reasonable time, place, and manner restrictions." *Turner*, 848 F.3d at 690 (quotation omitted); see *Fields*, 862 F.3d at 353; *Gericke*, 753 F.3d at 9; *Alvarez*, 679 F.3d at 605; *Glik*, 655 F.3d at 84; *Smith*, 212 F.3d at 1333.[9] Moreover,

9. Only *Gericke* involved a person recording a traffic stop. *See Gericke*, 753 F.3d at 7. In Gericke, the person who was recording the interaction was not in the car subject to the traffic stop. *Id.* Rather, she was in a different car and attempted to record the interaction

those circuit courts have explicitly declined to address "the limits of this constitutional right." *See, e.g., Fields*, 862 F.3d at 360; *Turner*, 848 F.3d at 690; Gericke. 753 F.3d at 9. Furthermore, the Third Circuit opined that an activity "interfer[ing] with policy activity" such that the recording "put[s] a life at stake" might not be protected. *Fields*, 862 F.3d at 360.

The Supreme Court has long recognized that police officers face unique dangers during traffic stops. *See Rodriguez v. United States*, 575 U.S. 348, 356-57, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015); *Arizona v. Johnson*, 555 U.S. 323, 330-32, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009); *Maryland v. Wilson*, 519 U.S. 408, 413, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997); *Michigan v. Long*, 463 U.S. 1032, 1047-48, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1997). "The risk of harm to the police and the occupants of a stopped vehicle is *minimized* . . . if the officers routinely exercise unquestioned command of the situation." *Johnson*, 555 U.S. at 330 (quotations omitted); *Wilson*, 519 U.S. at 414; *Michigan v. Summers*, 452 U.S. 692, 702-03, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981). Indeed, during the officers' interaction with Sharpe, Helms stated that

---

from a school parking lot adjacent to where the other car was stopped on the street. *Id.; cf. Fields*, 862 F.3d at 356 (observer on public sidewalk recording police disperse a house party); *Turner*, 848 F.3d at 683 (observer on public sidewalk recording a police station); *Alvarez*, 679 F.3d at 586 (pre-enforcement challenge to Illinois eavesdropping statute in order to prevent Illinois prosecutors from enforcing the eavesdropping statute against people openly recording police officers performing their official duties in public); *Glik*, 655 F.3d at 79-80 (observer on public sidewalk recording an arrest of another individual).

Sharpe's recording *and* real-time broadcasting of the traffic stop from within the stopped car was an "officer safety issue." Pl.'s Ex. A at 17. To be sure, a police officer's "command of the situation" during a traffic stop is not a license to violate the Constitution, including the First Amendment. Nonetheless, the court rejects Sharpe's argument and holds that, on October 9, 2018, during the traffic stop, Sharpe did not have a clearly established First Amendment right to record and real-time broadcast with the ability to interact via messaging applications with those watching in real-time. Thus, qualified immunity bars Sharpe's First Amendment claim against Helms in his individual capacity.[10]

C.

The only claims that remain are Sharpe's official capacity claims against Helms and Ellis under section 1983. Defendants did not move to dismiss Sharpe's claims under section 1983 against Helms and Ellis in their official capacities. *Cf.* [D.E. 15, 16, 20]. Nonetheless, if Sharpe lacks a legal basis on which to proceed with those claims, the court may address the claims in the interests of judicial economy. *See, e.g., Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 654 (4th Cir. 2006); *cf. Grier v. United States*, 57 F.3d 1066, 1995 WL 361271, at *1 (4th Cir. 1995) (per curiam) (unpublished table decision) ("Because it is clear as a matter of law that no relief could be granted under

10. This order does not address any First Amendment issue arising from an onlooker who is not within a stopped vehicle from recording and real-time broadcasting a traffic stop on a public road. *Cf. Gericke*, 753 F.3d at 7.

any set of facts that could be proved consistent with the allegations in [the] complaint, the court would have been warranted in either granting Defendants' motion to dismiss for failure to state a claim or ordering dismissal sua sponte, both under Rule 12(b)(6).").

A claim against a public official sued in his official capacity is "essentially a claim against" the government entity the official represents. *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985); *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 307 n.13 (4th Cir. 2006); *Love-Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004). Because Sharpe cannot sue WPD, Sharpe's claims against Helms and Ellis in their official capacities are functionally brought against the Town of Winterville. *See* Compl. at ¶¶ 37-43; *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 469 ("For purposes of section 1983, these official capacity suits [against government officials] are treated as suits against the municipality." (quotation and alteration omitted)); *see also Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991).

Municipal entities cannot be held liable under section 1983 solely because they employed a tortfeasor. Rather, when a municipal entity is sued—directly or in an official-capacity suit—the plaintiff must plausibly allege that a "policy or custom" attributable to the municipal entity caused the violation of the plaintiff's federally protected rights. *See Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 410, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997); *Hafer*, 502 U.S. at 25 (1991); *Graham*, 473 U.S. at 166; *Monell*,

436 U.S. 658, 690-94, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *King v. Rubenstein*, 825 F.3d 206, 223 (4th Cir. 2016); *Santos*, 725 F.3d at 469-70; *Carter v. Morris*, 164 F.3d 215, 218-19 (4th Cir. 1999). A violation results from a municipal entity's "policy or custom" if the violation resulted from "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690-91, 694; *see St. Louis v. Praprotnik*, 485 U.S. 112, 121, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988).

Not every municipal official's action or inaction represents municipal policy. Rather, the inquiry focuses on whether the municipal official possessed final policymaking authority under state law concerning the action or inaction. *See, e.g., McMillian v. Monroe Cty.*, 520 U.S. 781, 785-86, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986); *Riddick v. Sch. Bd.*, 238 F.3d 518, 523 (4th Cir. 2000). Furthermore, even if a section 1983 plaintiff can identify the requisite final policymaking authority under state law, a municipality is not liable simply because a section 1983 plaintiff "is able to identify conduct attributable to the municipality." *Riddick*, 238 F.3d at 524. Instead, a section 1983 "plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Brown*, 520 U.S. at 404 (emphasis omitted); *see City of Canton v. Harris*, 489 U.S. 378, 389-90, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989); *Riddick*, 238 F.3d at 524. Thus, to avoid imposing respondeat superior liability on municipalities, a section 1983 plaintiff must show that

"a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." *Brown*, 520 U.S. at 411; *see Harris*, 489 U.S. at 392; *Riddick*, 238 F.3d at 524; *Carter*, 164 F.3d at 218-19.

"Deliberate indifference is a very high standard—a showing of mere negligence will not meet it." *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999). Deliberate indifference requires "proof that a municipal actor disregarded a known or obvious consequence of his action" or inaction. *Brown*, 520 U.S. at 410. Moreover, even if a section 1983 plaintiff can show the requisite culpability, a section 1983 plaintiff also must show "a direct causal link between the municipal action [or inaction] and the deprivation of federal rights." *Id.* at 404. Thus, deliberate indifference and causation are separate requirements. *See id.*

A single act of a municipal official may result in municipal liability if that official has final policymaking authority under state law concerning the act. *See Pembaur*, 475 U.S. at 481; *Lytle v. Doyle*, 326 F.3d 463, 472 (4th Cir. 2003); *Riddick*, 238 F.3d at 523. An official has final policymaking authority if, under state law, the official has final authority "to set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely operational aspects of government." *Riddick* 238 F.3d at 523 (quotation omitted); *see McMillian*, 520 U.S. at 785-86; *Lytle*, 326 F.3d at 472; *Spell v. McDaniel*, 824 F.2d 1380, 1386 (4th Cir. 1987).

"[A] municipality is only liable under section 1983 if it causes [a constitutional] deprivation through an official policy or custom." *Carter*, 164 F.3d at 218; *see, e.g., Brown*, 520 U.S. at 403-04. This requirement limits municipal liability under section 1983 to those actions for which the municipality is actually responsible by distinguishing between acts attributable to the municipality and acts attributable only to municipal employees. *See, e.g., Brown*, 520 U.S. at 403-04; *Riddick*, 238 F.3d at 523. Therefore, a municipality may not be found liable under section 1983 based on a theory of respondeat superior or simply for employing a tortfeasor. *See, e.g., Brown*, 520 U.S. at 403.

To the extent Sharpe relies on respondeat superior for his claims against Helms and Ellis in their official capacities under section 1983, the Town of Winterville is not liable on that theory. *See, e.g., Brown*, 520 U.S. at 403. Accordingly, the court dismisses Sharpe's official capacity claims to the extent that he relies on a theory of respondeat superior.

To the extent Sharpe alleges a *Monell* claim based on a policy, custom, or practice of the Town of Winterville, the court must first determine whether Sharpe plausibly alleged that Helms and Ellis possess final policymaking authority under state law. *See McMillian*, 520 U.S. at 785-86; *Pembaur*, 475 U.S. at 481; *Riddick*, 238 F.3d at 523. In the complaint, Sharpe alleges that Ellis and Helms acted pursuant to a policy prohibiting recording and real-time broadcasting of police-citizen encounters. *See* Compl. at ¶¶ 40-41. As alleged, Ellis and Helms implemented the alleged policy, but did not create it. Moreover, under

North Carolina law, police officers do not possess final policymaking authority. *See, e.g., Glenn-Robinson v. Acker*, 140 N.C. App. 606, 631, 538 S.E.2d 601, 618-19 (2000); *Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 732-33, 468 S.E.2d 447, 450-52 (1996); *see also McMillian*, 520 U.S. at 785-86; *Lytle*, 326 F.3d at 472; *Riddick*, 238 F.3d at 523; *Spell*, 824 F.2d at 1386. Accordingly, Sharpe cannot base his *Monell* claim against the Town of Winterville on his single interaction with Helms and Ellis during the traffic stop. *See McMillian*, 520 U.S. at 785-86; *Pembaur*. 475 U.S. at 481; *Riddick*, 238 F.3d at 523.

Given that defendants did not move to dismiss the official capacity claim against the officers, the court will not dismiss the claim against the Town of Winterville. Whether this claim will survive a motion for summary judgment is an issue for another day. *Cf. Smith v. Atkins*, 777 F. Supp. 2d 955, 966-68 (E.D.N.C. 2011) (granting summary judgment to a municipality on a *Monell* claim).

IV.

In sum, the court GRANTS defendants' motion to dismiss [D.E. 15] and DISMISSES WITH PREJUDICE plaintiff's claim against WPD and plaintiff's claim against Helms in his individual capacity.

SO ORDERED. This 20 day of August 2020.

/s/ James C. Dever III
JAMES C. DEVER III
United States District Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED APRIL 21, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1827 (4:19-cv-00157-D)

DIJON SHARPE

Plaintiff-Appellant,

v.

WINTERVILLE POLICE DEPARTMENT; WILLIAM BLAKE ELLIS, IN HIS OFFICIAL CAPACITY ONLY; MYERS PARKER HELMS, IV, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY

Defendants-Appellees.

NATIONAL POLICE ACCOUNTABILITY PROJECT; THE INSTITUTE FOR JUSTICE; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW FIRST AMENDMENT CLINIC; THE DUKE UNIVERSITY SCHOOL OF LAW FIRST

Appendix D

AMENDMENT CLINIC; ELECTRONIC PRIVACY INFORMATION CENTER; ELECTRONIC FRONTIER FOUNDATION; CATO INSTITUTE

Amici Supporting Appellant,

SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION

Amicus Supporting Appellee.

ORDER

The petitions for rehearing en banc were circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petitions for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk